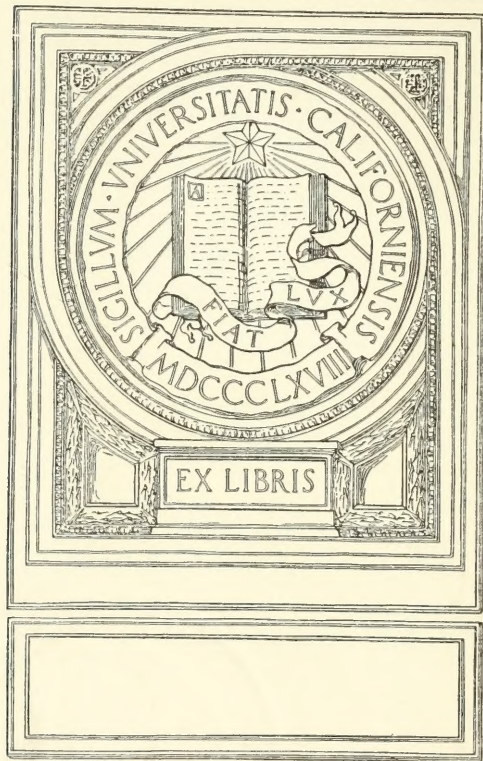






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AN INTRODUCTION TO  
THE PROBLEM OF  
GOVERNMENT

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AN INTRODUCTION TO THE  
PROBLEM OF GOVERNMENT

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# AN INTRODUCTION TO THE PROBLEM OF GOVERNMENT

BY  
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AN INTRODUCTION TO  
THE PROBLEM OF  
THE GOVERNMENT

WESTER W. HILLGOMBY

AND  
LINDSEY HERRICK

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## PREFACE

THE purpose of this volume is to introduce the reader to the problems of constitutional and popular government. Such a purpose cannot be achieved by simply furnishing an outline of the manner in which modern governments are organized. This knowledge the student must, of course, have; it is the material of political thought and is available in a number of excellent text books. But if the student is to derive any real value from the information which he has, he must have some appreciation of the place of politics in the social sciences; the right of the State to be; the sphere of state control; the practical problems with which all constitutional and popular governments are confronted; the manner in which States of the modern world have attempted to solve these problems; the relation of different political institutions and agencies to each other (for example, the analogy between the Congressional Caucus and the British Cabinet), and the reasons for their apparent success, or failure to achieve the ends for which they were instituted—in a word (although it may be a too ambitious way of stating our task), the principles behind the facts.

Such a theoretical insight is, we venture to think, of more value than a meticulous knowledge of one or more governments. It is of greater importance for the student to appreciate the nature of federal government than it is for him to know the intricacies of congressional procedure. Again, the control of foreign policy, a problem common to all modern governments and nowhere satisfactorily settled, is much more vital than the details of administrative reorganization in the United States. The comparisons may be

extreme ones, but they at least indicate our point of view, which may be re-stated somewhat differently:

Popular government, as Lord Morley has said, is not a delicately synchronized chronometer. It is, on the contrary, a rough piece of machinery which will work somehow, even though all of its parts are not perfectly adjusted. The nature and location of the minor parts are of less importance than the work which the machinery is expected to do, the forces which furnish its motive power, the broad plan on which it is constructed, and the general manner of its operation.

Our purpose has thus been to deal analytically and critically rather than descriptively with governmental structures. Descriptive material, however, has not been excluded. Care has been taken to illustrate concretely the abstract principles which have been discussed, but there is no pretence that the student is given a full description of the governments of any of the States whose constitutions are considered. We do venture to think, however, that the chapters which follow, with the illustrative material in the appendices, furnish an adequate outline for a course in Constitutional Government, and that any descriptive details which are deemed to be lacking can perhaps be better acquired from the constitutions themselves or from other texts, rather than that the student should get his descriptive knowledge without the synthesis and orientation which we have sought to provide.

So, also, the present volume may be useful in linking up existing political institutions with the subject matter of courses on the elements of Political Science or Political Theory. For, just as it is essential that the student of government see the problems common to all constitutional systems, and temporarily solved in different ways, so it is necessary that the student of political philosophy have his feet on the ground, and appreciate the connection between political thought and governmental adjustments. "



The authors are fully aware that this book is only an *introduction* to the problem of government. For this they make no apology. The subject is so intricate and its ramifications are so numerous that phases of it (which may seem to some readers to be important) are given summary treatment, considered only in the footnotes, or even relegated to the "Topics for Further Investigation" which are appended to each chapter.

From the pedagogical standpoint this is an advantage. The student should not think that the beginning and end of a course or a subject are between two covers; it is better for him to have a syllabus rather than a text book; for him, in many cases, to work out his own salvation on topics that are sufficiently important to warrant independent study, yet sufficiently simple not to impose too great difficulties. It is thought that this purpose may be more easily and more advantageously accomplished, with the aid of the unusually copious references which have been included to current political literature of an interesting and authoritative, but non-technical character. On pedagogical grounds, also, there is no objection to the repetition of certain matters (from different points of view) which the plan of our book makes inevitable. In result, then, it is hoped that the student may be led to a knowledge of the true meaning of constitutional liberty, and to an adequate understanding of the problems involved in the harmonizing of popular government with an efficient administration of public affairs.

From the standpoint of descriptive Political Science, there is no further interest in the Government of Germany as it was prior to the Revolution. It is, however, such an excellent illustration of the monarchical type that we have referred to it incidentally and have given it a rather full analysis. Monarchical government is also illustrated by a discussion of Japanese political institutions (with the Japanese Constitution in the Appendix). This space we

feel is justified because the Japanese Government is likely to be of increasing interest to American students. The new constitutions of European States have only been referred to incidentally, and it will be an admirable exercise for the student to take the texts which are available (in *Current History* and elsewhere) and check their provisions against the principles which are here discussed. It is unusual for the student to have the opportunity of studying so many fundamental laws paraphrased and analysed in descriptive textbooks.

The problems involved in the government of cities are not discussed in this volume. They are of such a special character that it has been thought best not to attempt their treatment even in outline.

Finally, it is a pleasure for the authors to acknowledge the assistance which they have received from their former student, Mr. James Hart, now of Harvard University. He has read the proofs and has made many helpful suggestions.

W. W. W.  
L. R.



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**AN INTRODUCTION TO THE  
PROBLEM OF GOVERNMENT**





# CHAPTER I

## INTRODUCTION: THE NATURE OF GOVERNMENT

IN ITS broadest meaning the term "sociology" embraces the systematic treatment of all the interests that arise from the life of men in social aggregates.<sup>1</sup> So considered, it includes within its general scope such particular branches of inquiry as Economics, Law, and Politics. In these special departments of knowledge, the facts dealt with are largely the same, the differences consisting in the stand-points from which they are viewed.

The Social  
Sciences

Thus, for example, the subject of crime is of concern to the economist. He is interested in its cost to society, the extent to which it is due to economic conditions, and the manner in which it enters as a disturbing element into economic life by rendering insecure the possession of property. To the lawyer, the subject is of importance as a violation of law, and as necessitating legal action for its punishment or prevention. To the student of Political Science it is of interest as being a revolt against the constituted authorities of the land, as an anarchistic element in the body politic, and, if widespread and continued, as endangering the very existence of the State itself. Or, as the difference has been stated by a distinguished English economist:

Economics is not a complete philosophy of society; it does not give a complete account even of that part of human conduct which it studies. The social relations to which business gives rise are the subject matter not only of Economics but also of the

---

<sup>1</sup>See W. W. Willoughby, *The Nature of the State*, p. 1 ff.

Ethics,  
Politics, and  
Economics

science of Politics, the study of social action in general, and of Ethics, the study of conduct in general. And Economics is the subordinate study of the three, because the problems of social practice to which its study is directed are seldom purely economic, and when it comes to action the ethical aspect is always, and the political aspect is usually, more important than the economic aspect. The study of the economic element in social and political problems is essential if they are to be solved, but few of them can be decided by purely economic considerations alone.<sup>1</sup>

The domain  
of Politics

To distinguish then, the domain of Political Science from the larger field of sociology and from the other special departments of knowledge embraced therein, we may say that Political Science deals with society solely from its organized standpoint—that is, as effectively organized under a supreme authority for the maintenance of an orderly and progressive existence. We thus distinguish between the conception of an aggregate of men as politically organized—as constituting a body politic—and the same community of men as forming merely a group of individuals with mutual economic and social interests. The body politic is the social body plus the political organization.

An aggregate of men living together and united by common interests and relationships may be termed a society. A human “society” is distinguished from the types of communal life exhibited by the lower beings, such as bees, wasps, and ants, in that there is in the minds of its members a common consciousness of mutual interests and aims. Giddings says:

<sup>1</sup>H. Clay, *Economics for the General Reader*, p. 15.

“Regarding man in his capacity as a self-directing individual, there are three fundamental aspects of civilization that have continuing and permanent significance. . . . These fundamental aspects are Ethics, the doctrine of conduct and service; Economics, the doctrine of gainful occupation; and Politics, the doctrine of reconciliation between the two and of living together in harmony and helpfulness.

“These are the three subjects which must lie at the heart of an effective education which has learned the lessons of war. To these all other forms of instruction are either introductory and ancillary, or complementary and interpretative.” N. M. Butler, “Education after the War,” *Educational Review*, January, 1919, p. 69.



Human society truly begins when social consciousness and tradition are so far developed that all social relations exist not only objectively as physical facts of association, but subjectively also, in the thought, feeling, and purpose of the associated individuals. It is this subjective fact that differentiates human from animal communities.

When  
human so-  
ciety begins

In its social consciousness a community has a living bond of union. The mutual aid and protection of individuals, operating in an unconscious way, are no longer the only means that preserve social cohesion: the community feels and perceives its unity. The feeling must be destroyed before rupture can occur.<sup>1</sup>

When this society becomes organized for the effectuation of certain general, or, as they are called, political interests, and with a magistracy into whose hands is entrusted the exercise of its controlling authority, it assumes a political form, and a State is said to exist. The rules defining the contents of this authority and the manner of its exercise may be termed the Constitution. As a preliminary definition of the State, we may say, therefore, that wherever there can be discovered in any community of men a supreme authority exercising control over the social actions of individuals and groups of individuals, and itself subject to no such regulation, there we have a State. The definition given by Holland is as follows:

A State is a numerous assemblage of human beings generally occupying a certain territory amongst whom the will of the majority, or of an ascertainable class of persons, is, by the strength of such a majority or class, made to prevail against any of their number who oppose it.<sup>2</sup>

Ihering defines the State as "the form of a regulated and assured exercise of the compulsory force of society,"<sup>3</sup> while Burgess describes it less specifically as "a particular portion of mankind viewed as an organized unit."<sup>4</sup>

Nature of  
the State

<sup>1</sup>"The Theory of Society," *Supplement to the Annals of the American Academy of Political and Social Science*, July, 1894, pp. 57, 60.

<sup>2</sup>*Elements of Jurisprudence*, 6th ed., p. 40.

<sup>3</sup>*Der Zweck im Recht*, Vol. I, p. 307.

<sup>4</sup>*Political Science and Constitutional Law*, Vol. I, p. 51.

## 4 PROBLEM OF GOVERNMENT

### Elements of a State

Without, however, further multiplying these definitions, or more particularly explaining them, we may, at this preliminary stage, declare the essential elements of a State to be three in number. They are:

(1) A community of people socially united.

(2) A political machinery, termed a government, and administered by a corps of officials termed a magistracy.

(3) A body of rules or maxims, written or unwritten, determining the scope of this public authority and the manner of its exercise.

### Divisions of Political Science

Just as the sciences of Economics and Jurisprudence may be further separated into distinct departments of inquiry, so does the domain of Political Science admit of further subdivision. Thus we may have: First, Descriptive Political Science, dealing with a description of the various forms of political organization; secondly, Historical Political Science, dealing with the inquiry as to the manner and order in which political forms or governments have appeared and developed; thirdly, Political Theory or Philosophy, concerned with the philosophical examination of the various concepts upon which the whole science of politics rests; and, finally, the Art of Government, or "Politics" properly so-called, dealing with the principles which should properly control the administration of public affairs.

### Art of Government

It is within the confines of the last named field that the present discussion falls, although the analysis of the nature of government will involve an examination of some of the fundamental concepts and postulates of Politics and a brief description of different forms of political organization. These illustrations will be of existing, or very recent types, and no attempt will be made to trace the development of the problem of government. Political institutions have been with us so long that we rather take them for granted and find it difficult to conceive of a régime in which men could live without some form of govern-

mental control. The relation of history and politics, however, is one of great importance to the student of government,<sup>1</sup> and a pressing need in the literature of political science is for a study of the origin of governmental institutions and for a careful account of their development.<sup>2</sup>

History and  
Politics

Here it may be said, briefly, that, with the advance of civilization, come augmented social needs and activities. The governmental organization of the State becomes a more complex structure, and is endowed with wider, and, at the same time, more definite power. Furthermore, the exercise of these powers becomes more intelligently controlled, and in a sense self directed—that is, dictated rather by the interests of a State itself, than by the personal interests of the individuals to whom the exercise of the State's powers happens to be entrusted. Likewise, from substantial similarity of governmental organization, in the early stages, States, in the course of their development,

Origin of  
political  
institutions

<sup>1</sup>There is a valuable discussion of this relation in Seeley, *Introduction to Political Science*, Lecture I: "it is the first aphorism in the system of political science which I am about to expound to you, that this science is not a thing distinct from history, but inseparable from it. To call it a part of history might do some violence to the usage of language, but I may venture to say that history without political science is a study incomplete, truncated, as on the other hand political science without history is hollow and baseless—or in one word:

History without political science has no fruit;

Political science without history has no root."

In another place Seeley says: "There is a vulgar view of politics which sinks them into a mere struggle of interests and parties, and there is a foppish kind of history which aims only at literary display, which produces delightful books hovering between poetry and prose. These perversions, according to me, come from an unnatural divorce between two subjects which belong to each other. Politics are vulgar when they are not liberalized by history and history fades into mere literature when it loses sight of its relation to practical politics." *The Expansion of England*, p. 193. Cf. also J. W. Garner, *Introduction to Political Science*, p. 33.

<sup>2</sup>The task has been attempted, brilliantly, but in brief compass, by Edward Jenks, *A Short History of Politics*, reprinted (1919) as *The State and the Nation*. Mr. Jenks points out that ignorance of early social conditions results in several practical evils: (1) "we fail utterly to understand the general outlook on life of those vast numbers of the human race who are still living in the pre-political age, and thus, in our dealings with them, are apt, with the very best intentions, to make the most disastrous blunders, which may involve bloodshed and waste"; (2) "an almost necessarily prejudicial view of the true functions of the State," for, "unless the attitude of the student of political institutions be one merely



assume diverging forms. Geographic, ethnic, economic, and moral conditions have their influence in determining the direction in which the development of political forms shall proceed. Distinctions arise as to the number of interests to be regulated by the State, as to the extent to which the people generally shall participate, either actively or by way of popular control, in the administration of their public affairs, and as to the manner in which the powers of the State shall be distributed among its several departments. There are thus developed all those varieties of governments running from the despotism of the Oriental State to the democracy of the Swiss commune. Later come such forms as the feudal State, the constitutionally limited monarchy, the so-called national State, and the federal State. Within each of these classes are also to be found governmental types distinguished from each other by the greatest variety of internal organizations.

It is a remarkable fact, however, that the study of these phenomena has not resulted in any principles which are of general validity.<sup>1</sup> This is not the place to discuss the controversy—which is really logomachy—as to whether there

---

of detached curiosity, he will be enormously helped in his estimate of the value and limitations of them by a knowledge of what preceded them"; and (3) an inability "to understand the great variations which have taken place in the development of political institutions issuing from the same source." "If we ask ourselves why institutions issuing from the same source assume such infinite variety of form, we shall probably find that the secret lies in the extent to which, and the manner in which, they are related to, and connected with, the pre-political institutions which they have followed." *The State and the Nation*, pp. 13-15. Seeley insists (*Introduction to Political Science*, Lectures II and III) on the importance of considering the rude, primitive community together with the civilized State, in the study of Political Science. See also R. H. Lowie, *Primitive Society*.

<sup>1</sup>As is well known prediction in politics is always very hazardous, but in spite of its dangers, it is very common. Lord Palmerston, for example, thought that the Suez Canal would mean the loss of India; Lord Morley believed that Australia would never fight in behalf of Belgium; Palmerston, Disraeli, and Delane expected the French to beat the Germans in the Franco-Prussian War; Lord Salisbury (contributing to the *Quarterly Review*) believed that Germany could not be united; the framers of the American Constitution thought they could guard against the evils of political parties. See H. A. L. Fisher, *Political Prophecies*, and the same writer's *The Republican Tradition in Europe* for his own anticipations concerning the future of democracy.

is an art or science of politics,<sup>1</sup> but it may be pointed out that, while scientific discoveries have "been so applied as to well-nigh revolutionize human affairs, . . . the knowledge of man, of the springs of his conduct, of his relation to his fellow-men singly or in groups, and the felicitous regulation of human intercourse in the interest of harmony and fairness have made no such advance."

Professor Robinson continues:

Aristotle's treatises on astronomy and physics and his notions of "generation and decay" and of chemical processes have long gone by the board, but his politics and ethics are still revered. Does this mean that his penetration in the sciences of man exceeded so greatly his grasp of natural science, or does it mean that the progress of mankind in the scientific knowledge and regulation of human affairs has remained almost stationary for over two thousand years? I think that we may safely conclude that the latter is the case. It has required three centuries of scientific thought and of subtle inventions for its promotion to enable a modern chemist or physicist to center his attention on electrons and their relation to the mysterious nucleus of the atom, or to permit an embryologist to study the early stirrings of the fertilized egg. As yet relatively little of the same kind of thought has been brought to bear on human affairs.<sup>2</sup>

It must be recognized, however, that the problem of political control—or government—presents an especial difficulty. Professor Robinson suggests it when he says that the senatorial debate on the League of Nations compares very unfavorably with the consideration which a broken down motor car receives in a roadside garage. The senator "appears too often to have little idea of the nature and

Is Politics a  
Science  
or an Art?

Political  
progress

<sup>1</sup>On this question, see Pollock, *History of the Science of Politics*, p. 2; and Amos, *The Science of Politics*, p. 2. Cf. the following quotation from Sir George Cornewall Lewis:

"The art of politics consists of precepts, founded on a scientific investigation, or at least arranged in a systematic form. These precepts are general in their expression; they refer to no definite actual case, but they profess to admonish; they lay down a rule or guide for action under certain supposed circumstances." *On the Methods of Observation and Reasoning in Politics*, Vol. II, p. 155.

<sup>2</sup>"The Mind in the Making," *Harper's Monthly Magazine*, September, 1920, p. 485. There is a suggestive distinction between "scientific" and "spiritual" progress in Gilbert Murray, *Religio Grammatici*.

workings of nations, and he relies on rhetoric and appeals to vague fears or hopes or mere partisan animosity."

Political progress is limited by the ignorance and prejudices of the people and those whom they select to govern them; the art of politics is conditioned by the shifting constituents of human nature. Habits, prejudices, passions, and loyalties must always be taken into account and what is ideally best may be impracticable.

#### Ideals and realities

Whether the peace of Europe, or the settlement of Ireland, or, to take the greatest of all, the establishment of a League of Nations be the matter in hand, the real difficulty is, as a rule, not nearly so much the discovery of what is best to be done as of what is the nearest approximation to it which, men and things being what they are, has any chance, first, of getting accepted, and secondly, of proving workable and lasting.<sup>1</sup>

In this sense politics is the science of the second best.

#### Psychological factors

Since Walter Bagehot wrote his little book, *Physics and Politics* (1873), discussions of the problem of government have taken psychological factors into account; the political theorist has turned social psychologist, or perhaps more frequently, the psychologist has transferred his attention to the behavior of men in political groups.<sup>2</sup> French philosophers and sociologists—among others Tarde,<sup>3</sup> Durkheim,<sup>4</sup> and Le Bon—have been prolific writers, and in England, very important work has been done by Graham Wallas<sup>5</sup>

<sup>1</sup>"Optimism after the War," *London Times Literary Supplement*, April 29, 1920.

<sup>2</sup>There is a good summary of the tendency in E. Barker, *Political Thought from Spencer to To-day*, p. 149 ff.

<sup>3</sup>*L'Opinion et la Foule* and *Les Lois de l'Imitation*.

<sup>4</sup>Gehlke, *Emile Durkheim's Contributions to Sociological Theory* (Columbia University Studies, Vol. LXVIII) and Barnes, "Durkheim's Political Theory," *Political Science Quarterly*, Vol. XXXV, p. 236 (June, 1920).

<sup>5</sup>*Human Nature and Politics* (1908) and *The Great Society* (1914). At the present day, writes Mr. Graham Wallas, "political experience is recorded and examined with a thoroughness hitherto unknown. The history of political action in the past, instead of being left to isolated scholars, has become the subject of organized and minutely subdivided labour. The new political developments of the present, Australian Federation, the Referendum in Switzerland, German



and McDougall.<sup>1</sup> But the "science," if it be that, is as yet only in its beginnings, and beyond indicating that there are problems connected with man's actions in a group, the social psychologist has not produced any body of principles which must be used by the student of government.<sup>2</sup>

It must be realized, furthermore, that political forms are haphazard; that in their development there is oftentimes the play of chance rather than conscious purpose. In England, for example, the foreign birth of the first two Georges and Queen Victoria's widowhood contributed to the decline of the royal power.<sup>3</sup> Indeed, the first Hanoverian's meager knowledge of the English language was responsible for the constitutional convention that the sovereign does not attend cabinet councils. France's republican form of government is a sheer accident, and by reason of their undeliberate promulgation, her constitutional laws exhibit many gaps.<sup>4</sup> There is nothing about judicial power, civil

Political  
accidents

Public Finance, the Party system in England and America, and innumerable others, are constantly recorded, discussed, and compared.

"The only form of study which a political thinker of one or two hundred years ago would now note as missing is any attempt to deal with politics in its relation to the nature of man. The thinkers of the past, from Plato to Bentham and Mill, had each his own view of human nature, and they made those views the basis of their speculations on government. But no modern treatise on political science, whether dealing with institutions or finance, now begins with anything corresponding to the opening words of Bentham's *Principles of Morals and Legislation*—'Nature has placed mankind under the governance of two sovereign masters, pain and pleasure'; or to the 'first general proposition' of Nassau Senior's *Political Economy*, 'Every man desires to obtain additional wealth with as little sacrifice as possible!'" *Human Nature in Politics*, pp. 11-12.

<sup>1</sup>*An Introduction to Social Psychology* (1908) and *The Group Mind. A Sketch of the Principles of Collective Psychology with some Attempt to Apply them to the Interpretation of National Life and Character* (1920).

Of interest also are Lippmann, *A Preface to Politics* (1913); Conway, *The Crowd in Peace and War* (1915), and Trotter, *Instincts of the Herd in Peace and War* (1917).

<sup>2</sup>See the searching reviews of McDougall, *The Group Mind*, *Political Science Quarterly*, Vol. XXXVI, p. 122 (March, 1921) and *The New Republic*, December 15, 1920. Under the title, "Human Nature and some Social Institutions," H. M. Kallen examines Mr. Wallas' most recent book, *Our Social Heritage*, in the *New Republic*, May 18, 1921.

<sup>3</sup>For an interesting discussion of this point see J. A. Farrer, *The Monarchy in Politics* and Lytton Strachey's recent biography, *Queen Victoria*.

<sup>4</sup>Henry Lefret, *Le Gouvernement et le Parlement*, p. 25.

liberty, and the private rights of individuals—surprising *lacunæ* in view of France's contributions to political theory.<sup>1</sup> In the United States, the growth of political parties was unanticipated by the "founding fathers"; no provision is made to fill the presidential office if the President-elect dies after election but prior to inauguration; Mr. Wilson's illness demonstrated the very incomplete and ambiguous constitutional preparation for presidential inability;<sup>2</sup> and, as Mr. Wilson and Mr. Roosevelt clearly showed, presidential theories can interpret and modify the formal relationship between the executive and the legislature. But the forms are far less important than the forces behind them.<sup>3</sup>

There is, finally, another factor which may be mentioned. In the ancient City States or in an absolute monarchy, there is little difficulty in determining who are the governors; but now the vast size and the extreme complexity of existing political systems make the real rulers of a society undiscoverable.<sup>4</sup> The task is not simply to

<sup>1</sup>E. M. Sait, *Government and Politics of France*, p. 15. Aside from the provision that the Chamber of Deputies must be based on universal suffrage, the Constitution is silent with regard to elections.

<sup>2</sup>See Rogers, "Presidential Inability," *The Review*, Vol. II. p. 481 (May 8, 1920).

<sup>3</sup>"Over three hundred different constitutions were promulgated in Europe between the years 1800 and 1880. So slow have men been in discovering that the forms of government are much less important than the forces behind them. Forms are only important as they leave liberty and law to awaken and control the energies of the individual man, while at the same time giving its best chance to the common good." Morley, "Democracy and Reaction," *Miscellanies* (Fourth Series), p. 300.

<sup>4</sup>The phrase is attributed to John Chipman Gray. Commenting on it Laski says (*Authority in the Modern State*, p. 29):

"The new Chancellor of the Exchequer may be dependent upon a permanent official whose very name is unknown to the vast majority whose destinies he may so largely shape; and, indeed, the position of the English Civil-servant has been defined as that of a man who has exchanged dignity for power." Compare the following from Burke (*The Present Discontents*): "Nations are not primarily ruled by laws; less by violence. Whatever original energy may be supposed either in force or regulation; the operation of both is, in truth, merely instrumental. Nations are governed by the same methods and on the same principles by which an individual without authority is often able to govern those who are his equals or his superiors; by a knowledge of their temper and a judicious management of it."

determine who is the political or legal sovereign; nor is it one of ascertaining public opinion. President Lowell has shown the difficulty of knowing what is, and what is not public opinion.<sup>1</sup> The electorate is influenced by "organized emotion," prejudices, non-rational inferences, and economic interests, rather than by reasoned judgments; its choice is limited by party leaders, who in turn are not its own masters; measures are framed by representatives who are influenced by considerations other than what really are, or what they conceive to be, the interests of their constituents; and after these processes are complete, the executive and the courts have their day. Any lawyer can tell who, juristically, exercises in a given government the several sovereign powers. But the legal question is simple compared with the problem of what political forces determine the decisions that are made. These forces are not easily understood, much less measured. Dicey's "political sovereignty" in public opinion is too simple. Harrington's famous statement that political power always follows economic power is—like many generalizations—a half truth, but is very suggestive. Moral, psychological, economic, social, and personal forces determine what decisions are actually made by the nominal or legal rulers—the government. If the term "political sovereignty" is permissible, it means the *predominant* force in this complex, the one that is most powerful, most of the time. To attempt to discover the real rulers is one of the most important tasks of political science.

The real  
rulers

Political  
power and  
economic  
power

#### TOPICS FOR FURTHER INVESTIGATION

The Relation between Ethics, Politics, Economics, and History.—Garner, *Introduction to Political Science*; Lieber, *Political Ethics*; Clay, *Economics for the General Reader*; Willoughby, *The Nature of the State*; Pollock, *History of the Science of Politics*; Seeley, *Introduction to Political Science*.

<sup>1</sup>Public Opinion and Popular Government.

Is Politics an Art or a Science?—Garner, *Introduction to Political Science*; Pollock, *History of the Science of Politics*; Bryce, *Modern Democracies*; Lewis, *On the Methods of Observation and Reasoning in Politics*.

The Origin of Political Authority.—Jenks, *The State and the Nation*; Jenks, *Law and Politics in the Middle Ages*; Willoughby, *The Nature of the State*.

Psychology and Political Science.—For references, see above, pp. 8, 9.



## CHAPTER II

### PRELIMINARY DEFINITIONS

A STATE, concretely viewed, is a group of individuals regarded as a politically organized unit.<sup>1</sup> Such a group is said to be politically organized when it recognizes an allegiance and yields obedience to a ruling organization which is regarded as the ultimate source and enforcer of all legally binding rules for the regulation of the relations of the individuals with one another and with this law-making and law-enforcing authority itself. In this concrete sense we speak of the English people or of the people of the United States of America as constituting a State. Sometimes, also, by a not very correct transference of the term, we speak of the territory inhabited by a politically organized people as a "State," as, for example, when we speak of the territory inhabited by the French as the State of France. These are concrete conceptions of the State.

What is the State?

A State, abstractly considered, is a group of individuals

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<sup>1</sup>For a great number of definitions by different writers on politics, see Garner, *Introduction to Political Science*, Chapter II.

State "means two things. It means the government of a community, as when we speak of State interference; it also means the community itself, as a body of men organized under a government. The former seems to me the original sense; and its origin may be conceived, . . . in the following way. Just as an owner or possessor has a standing or position or state in respect of his land; just as the member of a class has a standing or position or state in respect of his class—so the king or governing organ of a community has a standing or position or state in respect of his or its authority. Governors have position or state. . . . State, then, is originally the position of authority (magnificent and majestic authority, which keeps solemn 'state'), appertaining to the prince or governing organ of a community; and then it is, by a natural transference, the prince or governing organ himself or itself, just as 'estate,' is originally the position of membership of a class, itself. It is an easy transition from the prince or governing organ of a community to the community itself as an organized body living under a government." Ernest Barker, "The Word 'State,'" *London Times Literary Supplement*, September 23, 1920. The same issue contains a discussion of the subject by Prof. A. F. Pollard.

The per-  
sonality of  
the State

viewed in a certain aspect, namely, as a politically organized entity. Thus regarded, the State appears merely as the concept of the jurist or political philosopher. In the jurist's eyes it is envisaged as a political person possessing a legally supreme will, termed Sovereignty, the expression of which takes the form of laws, that is, of commands legally binding upon all individuals over whom it claims authority. When thus viewed as a person, the State is, of course, not regarded as a true living being and is spoken of as a person only in order to give a certain logical coherence to legal and political thinking; the idea serves, as it were, as a peg upon which to hang the various attributes which constitutional and international law ascribes to the supreme governing authority in a politically organized community.<sup>1</sup>

Interna-  
tional and  
Constitu-  
tional Law

Regarded in this abstract sense, the term "State" connotes, in the field of constitutional or municipal law, the ideas of political superiority and political inferiority, of a governing authority and a governed body of individuals. In the field of International Law it connotes the idea of legal equality between the various members of what is known as the Family of Nations. In other words, as an international person, each sovereign or independent State is given the same legal status, and to all of them are ascribed the same rights and obligations in their dealings with one another.<sup>2</sup>

The organization or machinery through which the State formulates and executes its will is termed its Government.<sup>3</sup>

<sup>1</sup>The literature of pacifism takes vigorous exception to the "personality" of the State. See Angell, *The Great Illusion*; G. L. Dickinson, *The Choice Before Us*, and Burns, *The Morality of Nations*. The political pluralists also join the attack. See Duguit, *Law in the Modern State*, and Laski, *Authority in the Modern State*.

<sup>2</sup>See Hershey, *Essentials of International Public Law*, and E. D. Dickinson, *The Equality of States in International Law* (1920).

<sup>3</sup>"Government is not made in virtue of natural rights, which may and do exist in total independence of it; and exist in much greater clearness, and in a much greater degree of abstract perfection; but their abstract perfection is their practical defect. By having a right to everything they want everything. Gov-

Thus, just as a man, considered as a person, is able to will and act only through his physical framework or complexus of organs, so a State can act only through one of its governmental organs. The government of a State includes, comprehensively, not only its central organs but all its local agencies of control. It embraces also instrumentalities for the expression of its will which may be only occasionally brought into actual existence and active operation. Thus, the Government of the United States of America, conceived of as a single Sovereign State, embraces not only the organs of its National or Federal government, but also the aggregate of the governments of all of the member states of the Union, including their several systems of local governing organs. It includes also constitutional conventions when assembled, or state legislatures acting as such for the creation of Constitutional Law.<sup>1</sup>

State and  
Government

Another sense in which the term "government" is often employed needs to be noted. According to this usage the word indicates the body of persons who happen to be in control of the machinery of the State and especially of what are known as the executive organs. Thus we find such expressions as: "The Government has such or such a policy" . . . "a Government proposal" . . . "The Liberal Government in England" . . . "Asquith's Government" . . . etc.<sup>2</sup> As a substitute for the term "government," as thus employed, we also find

Government  
and  
Executive

ernment is a contrivance of human wisdom to provide for human wants." Burke, *Reflections on the Revolution in France* (Select Works: Oxford Edition), Vol. II, p. 70. "The government is the collective name for the agency, magistracy, or organization, through which the will of the state is formulated, expressed, and realized. The government is an essential element or mark of the state, but it is no more the state itself than the brain of an animal is the animal itself, or the board of directors of a corporation is itself the corporation." Garner, *Introduction to Political Science*, p. 44.

<sup>1</sup>The meaning above given to the term "government" is broader than that given to it by some writers, notably by J. W. Burgess in his *Political Science and Comparative Constitutional Law*. It is believed, however, that the definition which is here employed has the sanction of the best writers and in practice will be found the more useful.

<sup>2</sup>See the distinctions in Lewis, *The Use and Abuse of Political Terms*, p. 18.

the word "Administration" used. Very frequently, also, the Executive, as distinguished from the Legislature, is indicated by the word "Government." This is especially true in such States as Prussia or the German Empire, in which the representative law-making bodies have not possessed a decisive voice in determining the policies of the State.

People and  
Nation

In political nomenclature the terms "people" and "nation" have no fixed usage. The tendency is, however, to restrict the term "people" to the citizens of a State collectively considered, and to give to "nation" an ethnic or racial signification, as referring to a group of individuals united by racial affinities. Thus the Swiss "people" may be said to be made up of contingents from three "national" groups—the Germans, French, and Italians. In addition to actual blood relationships, community of language, historical traditions, and similarity of customs and ideals serve as powerful forces to weld individuals together into a single nation, even though, politically and geographically, they may be broken up into separate groups. It is to be observed, however, that, contrary to this usage, there is a growing tendency to describe as the "nationals" of a State those persons who owe to it their primary and permanent allegiance. Here the term nation is given a purely political meaning.

Identity of  
interests

Back of every State, and constituting its psychological basis, there must be in its citizen body a feeling of unity of ideals and of identity of interests which disposes the individuals to act as a single group and to submit to a common political authority. As the eminent Austrian publicist, Jellinek, has put it:

The inner ground of the origin of the State is the fact that an aggregate of persons has a conscious feeling of its unity and gives expression to this unity by organizing itself as a collective personality and constituting itself as a volitional and active subject.<sup>1</sup>

<sup>1</sup>*Die Lehre von den Staatenverbindungen*, p. 257.



This essential psychological element must first exist subjectively in the minds of a people, and then become objective in laws and political institutions. This is not to say that a "consciousness of kind," as the sociologist terms it, must be present in the mind of every individual, or, indeed, of every smaller group of individuals constituting the body politic; but it must be definitely present in the thought of the ruling classes, and at least vaguely felt by the generality of the people, or they would not be willing to give that support to the government without which it could not continue to exist. It is in this sense that Hume says that every government, however autocratic in character, is maintained by public opinion. This public opinion in all States more or less determines the form of governmental organization and its activities and modes of operation; and it is this force which, when unduly resisted, bursts the barriers of established law and political authority and inaugurates revolutionary action. In backward areas under the control of more advanced governments, public opinion is merely a negative check, particularly so in normal, non-revolutionary times.

Importance  
of Public  
Opinion

It may be, however, that for long periods of time, the great majority of a people who have not the actual control of their government, have a desire for political unity other than that which is realized under the existing state organization. They may desire to divide into separate political groups, or to unite with some other political group. While this feeling exists to any considerable extent, the State of which they are the body-politic can maintain only an unstable equilibrium. But it is not until the pent-up flood of feeling rises to a sufficient height that the bonds which preserve the political *status quo* are broken, and the opportunity given for the establishment of new state relationships.

National  
and political  
unity

The natural tendency is for a feeling of nationality to find expression in political unity, for the true psychological elements that lie at the bases of the nation and of the

State are largely similar. The same conditions that tend to create the feeling of nationality tend also, in most cases, to demand the establishment of the State. Absolute identity of the two sentiments cannot, however, be affirmed. It is possible to have present a well-developed feeling of nationality with but little, if any, desire for political unity.<sup>1</sup> The present world presents conspicuous illustrations of this. On the other hand, we find instances in which the establishment of political unity is clearly demanded by a people among whom there is no claim of a common nationality.

The War  
and the  
National  
Principle

As the basis of political organization, the principle of nationality is decidedly modern; it scarcely goes back so far as the French Revolution. Without tracing the history of the principle or discussing the validity of the various claims which have been made in its name, it may be said that in a sense the World War carried the theories of the French Revolution to their logical completion, with the Allied Powers pledged to secure their success. Writing

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<sup>1</sup>"Scotland is a nation and not a State. So is Poland. So is Finland. Austria-Hungary is a State and not a nation. So is the Ottoman Empire. So is the British Commonwealth. So is the United States. It may not be easy to define exactly what a State is. It is certainly not easy to define exactly what a nation is. But at least it ought to be easy to perceive that there is a difference between the two." Zimmern, *Nationality and Government*, p. 34.

Nationality is defined by Mr. Zimmern as a form of "corporate sentiment of peculiar intensity, intimacy, and dignity related to a definite home country." (p. 52). One may find fault with the vagueness of this definition on the ground that it does not reveal the fact that the ties, whatever they may be—racial, religious, educational, linguistic, geographical—are so strong that subjection will not be endured. Nationality has a political significance which Mr. Zimmern is not only eager to criticise but even, in places, is prone to deny; and the problem of nationality will never be solved by refusing to recognize its political implications. Mr. Zimmern is a disciple of Lord Acton and repeatedly quotes from the latter's well-known essay (in *History of Freedom and Other Essays*, Chapter IX), which brands the theory of nationality as "more absurd and more criminal than the theory of socialism." Mr. Zimmern neglects to state, however, that Lord Acton, when he wrote in 1862, had in mind the restoration of the temporal power of the Catholic Church.

Mr. Zimmern does not go quite so far as Lord Acton, but he does object to the political recognition of nationality on the ground that it would base the State not "on any universal principle such as justice or democracy, or collective consent, or on anything moral or universally human at all, but on something partial, arbitrary, and accidental." There are fundamental objections to a purely political interpretation of nationality, for it, "like religion is subjective; Statehood is

at the beginning of the war, Émile Boutroux, the French philosopher, remarked that the Declaration of 1789 proclaimed, "as also had America, that men are born free and equal in their rights and that they continue so. The French theory of nationality consists in extending to nations that which, in this maxim, is now affirmed of individuals." More than a century, and a series of bloody wars, were necessary for the fruition of this principle, but without exception the powers which met at Paris to draw up the Treaty of Peace agreed that, in President Wilson's phrase, "all well-defined national aspirations shall be accorded the (utmost) possible satisfaction." Out of the ruins of Russia alone there have come a number of new states: Armenia, Azerbaijan, Esthonia, Finland, Georgia, Latvia, Lithuania, Poland, Turkestan, and the Ukraine.<sup>1</sup> The boundaries of the new States in Eastern Europe were among the most difficult problems confronting the Peace Conference, and are fraught with the seeds of future wars.<sup>2</sup> This increase in the number of nation States, while accepted for the purposes of the peace treaty, does not go unchallenged, and even when it is approved, limitations must be recognized. As the basis of authority in the State, the national principle is inadequate; it does not imply collective consent, or justice, or democracy. There is a grave danger

The Succession States

Nationalism and Imperialism

objective. Nationality is psychological; Statehood is political. Nationality is a condition of mind; Statehood is a condition in law. Nationality is a spiritual possession; Statehood is an enforceable obligation. Nationality is a way of feeling, thinking, and living; Statehood is a condition inseparable from all civilized ways of living." Rightly regarded, nationality "is not a political but an educational conception." It has had a political importance "because wicked and autocratic governments have interfered with the social and traditional life and offended the deepest instincts of the nations concerned." Mr. Zimmern apparently believes in nationality largely because its alternative is spiritual atrophy.

<sup>1</sup>See *Statesman's Year-Book*, 1920.

<sup>2</sup>Out of a great mass of literature on the national principle the following will be useful:

Toynbee, *Nationality and the War*; J. H. Rose, *Nationality in Modern History*; Muir, *Nationalism and Internationalism*; Barnes, "National Self Determination and the Problems of the Small Nations", in Duggan, *The League of Nations: The Principles and the Practice*, Chap. IX; Bryce, *Essays and Addresses in War Time*.



Rights of  
racial minor-  
ities

that minorities will be tyrannized, and that there will exist the impulse to expand and conquer. The first danger was sought to be avoided by clauses in the peace treaties and in the new constitutions guaranteeing the rights of minority races, but the history of Europe after the Peace Conference has shown the close connection between nationalism and imperialism.

Control of  
backward  
races

The factors that create the feeling of nationality are community of race, language,<sup>1</sup> historical tradition, identity of economic interests, and a like degree of civilization. These are also factors which are clearly influential in the establishment and maintenance of political relationships. But in some cases political control over a definite territory and its inhabitants is due to nothing more than political expediency—the necessity for self-defense or the desire for offensive strength. And where colonies or other dependencies are held by more powerful bodies-politic the wishes of their inhabitants may not be in any wise consulted. The parent State may hold them with a view to its own selfish political or commercial aggrandizement, or the more altruistic view may be taken that this political dominion is maintained in order that the dependencies and their inhabitants may be brought to a higher state of social, political, and material development than would be possible if they were left, uncontrolled and undirected, to their own efforts.

A "law," in its strict juristic or political sense, is a rule of conduct, which, whatever its original source, or the mode of its enunciation, has the sanction of the State, and will, if necessary, be enforced by its might. It is thus a command from a political superior to a political inferior. It creates "rights" as regards those who will be benefited

<sup>1</sup>In a striking article contributed to the *American Political Science Review*, Vol. X, p. 44, entitled "Language and the Sentiment of Nationality," Professor C. D. Buck shows the very great influence of language in creating a national sentiment. He ascribes to it a force equal to, if not greater than, that of blood relationship.



by its enforcement, and imposes "duties," and "obligations" upon those who are constrained by its mandates. The penalties attached to a disobedience to its commands are spoken of as "sanctions." A command without a "sanction" which will be applied by the State is, by some, declared not to be a "law" at all; by others, it is spoken of as a "law of imperfect obligation."

The Nature  
of Law

A particular command of the State is denominated "a law"; the aggregate of these Laws of a State is designated as "the law." "Law" without either the definite or indefinite article is the abstract or general term as, for example, when we speak of being governed by Law, rather than by popular custom, or by the arbitrary judgments of particular men. We speak also of Law as the name of the science which deals with juristic or juridical principles. As thus used it is synonymous with "jurisprudence."<sup>1</sup>

A State operates wholly within the realm of Law; that is, a Law is necessarily an expression of the will of the State,<sup>2</sup> and the will of the State can find authentic expression only in legal forms. The Law is thus, as it were, the atmosphere in which the State lives and has its being. The State can no more escape from the *milieu* which the Law creates,<sup>3</sup> than can matter, as we know it, escape from three-dimensional space. An act of an organ or official

Law and  
the State

<sup>1</sup>"A developed system of law may be looked at from four points of view:

"1. Analytical.—Examination of its structure, subject-matter, and rules in order to reach its principles and theories by analysis.

"2. Historical.—Investigation of the historical origin and development of the system and of its institutions and doctrines.

"3. Philosophical.—Study of the philosophical bases of its institutions and doctrines.

"4. Sociological.—Study of the system functionally as a social mechanism and of its institutions and doctrines with respect to the social ends to be served." Pound, *Outlines of Lectures on Jurisprudence*, p. 1.

<sup>2</sup>For different definitions of law, see Pound, *Outlines of Lectures on Jurisprudence*, pp. 56-66; Holland, *Jurisprudence*, Chapter 1; Salmond, *Jurisprudence*, secs. 1-4; Brown, *The Austinian Theory of Law*, secs. 640-669; Gray, *The Nature and Sources of the Law*, secs. 288-321, Duguit, "Law and the State," *Harvard Law Review*, Vol. XXXI p. 1 (1917) and Pollock, *First Book of Jurisprudence*, Part I.

<sup>3</sup>See Crane, *The State in Constitutional and International Law* (Johns Hopkins Studies, Vol. XXV). On the controversy as to whether international law has a

of a government which is not warranted by existing law, though committed in its name, is therefore not an act of the State and may not be defended as such. Such an illegal act whether committed by a public functionary or by a private individual has, however, a legal significance in the sense that it lays a basis for punishment by the State or for indemnity to be paid by the offender to those whose legal rights may have been violated.<sup>1</sup>

Constitutional Laws

The Constitution of a State is the collective name given to the body of provisions or principles which determine the form of government and allot to its several organs their respective powers. The provisions and principles may be written and found stated in formal instruments of government or they may be unwritten, as is the case with Great Britain. The specific principles or rules which collectively determine the Constitution of a State are known as Constitutional Laws.

Written and unwritten

In all those States in which there is a written Constitution, there also exist a considerable number of unformulated principles or practices which, strictly speaking, cannot be said to be Laws, but which none the less play an important part in determining the actual manner in which governmental powers are exercised, and the character of the political rule that prevails. Thus, to give but one or two examples, in the United States it is clear that the real character of the government which exists is largely influenced by the rules of legislative procedure that are followed, by the activities of political parties, by the standards that guide the appointing powers with reference to the persons selected by them for public office, etc.<sup>2</sup>

legal nature, see Willoughby, "The Legal Nature of International Law," *American Journal of International Law*, Vol. II, p. 397 and Scott, *ibid.* Vol. I, p. 831.

<sup>1</sup>For a discussion of the unwillingness of the State to permit itself to be sued for tortious acts see below, Chapter XXI.

<sup>2</sup>Not to mention "senatorial courtesy"; the tradition against a third term for the President; the fiction of the electoral college; the customary selection of nominees from "pivotal states"; the choice of representatives only from districts in which they reside, etc. See Bryce, *The American Commonwealth*, Chap. XXXIV.

Conversely, in Great Britain, which is without a formal written Constitution, the nature of the government is, nevertheless, very considerably determined by provisions embodied in acts of Parliament and which are therefore strictly legal in character. And it is also true that many of the conventions or customs which give character to the English Constitution while not, in themselves, legal, are, nevertheless, so inextricably bound up with those that are, that a departure from them is almost necessarily attended by illegal results.<sup>1</sup>

From what has been said it is seen that if we define the Constitutional Law of a State according to its substantive contents, that is, as the body of principles which determine the form and operation of the government, we necessarily include within its scope many provisions which are not, in the strictest sense of the term, legal in character. In a scientific treatise on jurisprudence this usage would not, perhaps, be very satisfactory, but it is not improper in dealing with the problem of government. Moreover, any danger to exact thinking which may attend the definition of Constitutional Law which has been given will be avoided by a study of the later chapters in which the nature of "constitutional government" and its various types will be considered.

The terms Administration and Administrative Law, which are necessarily employed in a treatise on government, are even less susceptible of precise definition than are the terms Constitution and Constitutional Law. The administration of a government is its operation; it is the carrying into effect of the will of the State through its governmental agencies.<sup>2</sup> Thus we speak of the "administration" of a President of the United States, or of the

<sup>1</sup>See Dicey, *The Law of the Constitution*, Chap. XIV, where a number of customs, practices, maxims, and precepts are discussed.

<sup>2</sup>"The action of the State as a political entity consists either in operations necessary to the expression of its will, or in operations necessary to the execution of that will." Goodnow, *Politics and Administration*, p. 9.



Ministry or political party which is in control of the English government; and by administrative laws we refer to those legal rules in accordance with which the tasks of government are executed. So, similarly, we speak of an administrative organ or administrative official when to it or to him is entrusted the function of carrying into effect the provisions of law with reference to the actual control and direction which the State exercises.

Administra-  
tive and  
executive  
functions

It is thus clear that there is a very close relation between the terms "administrative" and "executive." The two are not, however, identical, although they considerably overlap and, where they so do, may be used interchangeably. The further discussion of this point will, however, have to be deferred until we come to speak specifically of the executive function of government.<sup>1</sup>

The right of the State to exist, by which is meant the moral justification for political authority in general, is one question and distinct from it are the questions as to ethical or moral justification of particular forms of government or of their acts, and of the right to political authority of those who are in control of the government. These latter questions will receive later consideration. For the present we shall have to do with the abstract right of political coercion in any form to be exercised over individuals.

Right of the  
State to be

This problem is often put as if there were a possible alternative between the existence of a State and the absence

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<sup>1</sup>"If we analyze the organization of any concrete government, we shall find that there are three kinds of authorities which are engaged in the execution of the state will. These are, in the first place, the authorities which apply the law in concrete cases where controversies arise owing to the failure of private individuals or public authorities to observe the rights of others. Such authorities are known as judicial authorities. They are, in the second place, the authorities which have the general supervision of the execution of the state will, and which are commonly referred to as executive authorities. They are, finally, the authorities which are attending to the scientific, technical, and, so to speak, commercial activities of the government, and which are in all countries, where such activities have attained prominence, known as administrative authorities." Goodnow, *op. cit.*, p. 17.



of all control or coercion over the individual.<sup>1</sup> Such a condition of complete individual freedom would be possible only in a state of society in which all the individuals composing it recognize that there is no necessary conflict between their several interests and voluntarily refrain from any attempt to realize ends which interfere in any way with the realization of those ends which all other individuals desire to attain. It does not need to be said that no such community of completely rationalized and moralized people has ever existed, and there is little evidence to indicate that such a perfected group will come into existence within any future time to which any finite limits may be set.<sup>2</sup>

Freedom  
and  
coercion

As soon as conflicts of individual interests arise, or are believed by individuals to exist, either among themselves or with other social groups, coercion in some form must make its appearance. For where desires conflict, all cannot be satisfied. Either each individual will have to yield in part, or one or more will have to give way wholly to the others. The assumption of a possible complete individual freedom in its socio-political sense, in any community of men of which we have any knowledge, or which we can reasonably conceive of as being established and maintained, is therefore without warrant. To maintain this absolute liberty as to one individual is to deny it to all other individuals, and to maintain it as to all is to deny it to any particular person.

Coercion is  
inevitable

The question of the rightfulness of political authority

<sup>1</sup>"The State, as Aristotle said long ago, is a sovereign association, embracing and superseding, for the purposes of human life in society, all other associations. The justification of the State's claim to peculiar authority is that experience shows it is mankind's only safeguard against anarchy and that anarchy involves the eclipse of freedom. Haiti and Mexico to-day are the best commentaries on that well-thumbed text, of which priests and barons in the earlier ages, like Quakers and plutocrats and syndicalists in our own, have needed, and still need to be reminded. Freedom and the good life cannot exist without government. They can only come into existence through government." Zimmern, *Nationality and Government*, p. 56.

<sup>2</sup>See the discussions in Russell, *Proposed Roads to Freedom*, and Jethro Brown, *The Underlying Principles of Modern Legislation*, pp. 1-36.

thus reduces itself to this: Is the coercion which the State applies preferable to that which would be exerted if there were no State? To the question thus put, there can be but one answer.

And prefer-  
able to  
anarchy

By the creation of a political authority there is substituted a general, fairly definite, paramount force for the uncertain, arbitrary coercion that in a non-political society would be exerted by the physical powers or cunning of individuals or shifting groups of individuals. It is possible, by a feat of the imagination, to conceive of a State, so badly organized, and its powers so oppressively exercised, that a condition of complete anarchy would be preferable to it; but, in general, it may be said that almost any form of political control is better than no political control whatever. This is as near as one is justified in asserting that, as an abstract or general proposition, the State—that is, apart from any concrete and specific manifestation of its power—has a right to exist. It will be observed that, even as thus made, the moral rightfulness of political authority is asserted only as contrasted with no coercive social regulation whatever. Any given government is ethically justified only as a means to an end—as an instrumentality through which beneficial results are obtained for those who come under its authority. It is therefore ethically incumbent upon those who support it, as well as upon those who administer it, that this political machinery shall be so constructed and operated as to secure the best possible good for all concerned.

Government  
a means to  
an end

Any given State or any given government is thus morally justified just to the extent to which it seeks and realizes the best possible good for its people. This is a continuing test which must be applied to every State, and the same criterion is applicable to each feature of its governmental organization and to each of its activities. The “code of morality” of a community, whether founded upon eternal, immutable principles of right and wrong, upon the dictates

of men's consciences as completely autonomous, upon reason naturally or divinely revealed, or upon utility as disclosed by inherited experience, is necessarily relative to the state of enlightenment, character of religion, philosophical reflections, economic conditions, and civilization in general of the particular individuals by whom its provisions are recognized. Taking any code of morality at any one time, the laws of a State are, in that light, morally justified to the extent to which they coincide with its precepts and aid in the realization of its ends.

**Tested by  
results**

This is a point the importance of which warrants some reiteration. In summoning a particular State to the bar of moral criticism, it is its form of organization and its activities, rather than its abstract right to exist which is brought to trial. For, until a State manifests its power and authority, there is no material to which ethical estimates may be applied.

When, then, a State has commanded a certain line of conduct, this is not absolutely determinative of the morality of the command. This the individual must decide for himself. This judgment is an obligation from which he cannot escape if he would. It must, therefore, be admitted that there can be circumstances under which an individual would be justified in refusing his obedience to the commands of those who are in legal authority over him. It is upon this right, as applied to large groups of individuals, that the right of revolution is founded. But, in deciding whether or not obedience is to be rendered to the political authorities that be, the individual is morally bound to take into consideration all the possible consequences of his act. In any case he is to be guided by considerations of the general good rather than of his own selfish interests, and he is to appreciate that his disobedience to a command of the State will tend to weaken the reverence for Law in general and thus have an influence in dissolving those social and political bonds which, in the

**Right of  
Revolution**

aggregate, promote the realization of morality as a whole. The moral right of revolution cannot be denied, but it is a right the exercise of which can only be justified when all the consequences, ultimate as well as proximate, social as well as individual, have been duly considered and the reasoned judgment reached that good rather than evil will result.<sup>1</sup>

German  
Theory of  
the State

It would seem that what has already been said would be sufficient to render unnecessary a denial of the principle that the State is an end in itself. Nevertheless, the persistence with which the doctrine is asserted, and not infrequently acted upon, that there is a welfare of the State which may be dissociated from the welfare of the persons governed by it, makes it desirable that a word be said specifically upon this point.

The State is  
not a moral  
entity

There is, indeed, a welfare of the political whole which is different from the aggregate of the special particularistic interests of the citizens individually considered; but it is a welfare that is wholly made up of interests which are common to those citizens, and of such a character that they may be protected or promoted by political means.<sup>2</sup> To repeat what has already been said, the State, though a "person" in the eyes of the Law, is not a real being, existing as an independent entity, and with a life and ends of its own which can be stated in terms other than those of the welfare of its subjects; any more than an ordinary business corporation can be said to have interests of its own other than those of its stockholders. There cannot, therefore, be any legitimate claim upon the citizen to make

<sup>1</sup>The right of revolution has lately been the subject of a rapidly increasing literature. See R. W. Postgate, *Revolution from 1789-1906* (1920); C. D. Burns, *The Principles of Revolution* (1920); H. M. Hyndman, *The Evolution of Revolution* (1920); Eden and Cedar Paul, *Creative Revolution* (1920), and the voluminous materials on the Russian Revolution.

<sup>2</sup>See on this point the discussions of the German theory of the state, *inter alia*, Bryce, *Essays and Addresses in War Time*; Gooch, "German Theories of the State," *Contemporary Review*, June, 1915; Hobhouse, *The Metaphysical Theory of the State* (1919); and Phillips, "The Ethics of Prussian Statecraft," *Quarterly Review*, October, 1918.



any sacrifices for the advancement of the national strength or international prestige of a State unless it can be shown that in some substantial way the welfare of human beings will be promoted. This caution is one that is especially needed in the field of international and colonial relations. Wars are without moral justification if they are waged merely for national glory or aggrandizement; and the holding of unwilling peoples in colonial or other forms of political subjection cannot be ethically defended except upon the ground that their true welfare will thereby be advanced.<sup>1</sup>

International  
Ethics

It is upon considerations such as have been set forth that a true doctrine of patriotism is founded; and it is upon these same considerations that the demand for free political institutions must find its ethical and utilitarian support.

The State itself, as we have seen, is not a moral entity to which ethical responsibility can be imputed. For its existence and for each of its activities certain human individuals are responsible; and this individual responsibility is measured by the extent to which each person has contributed, by his influence or acts, in determining the character and manifestations of the political authority to which he yields obedience. Upon those who occupy the seats of political power the chief responsibility rests, but this responsibility is shared by all those who, by their votes or other political influence, determine the form of

Rulers are  
morally  
responsible

<sup>1</sup>But such a defense is generally forthcoming. "To the ancient civilizations of India or of Egypt it [the British Empire] is a power which, in spite of all its mistakes and limitations, has brought peace instead of turmoil, law instead of arbitrary might, unity instead of chaos, justice instead of oppression, freedom for the development of the capacities and characteristic ideas of their peoples, and the prospect of a steady growth of national unity and political responsibility. To the backward races it has meant the suppression of unending slaughter, the disappearance of slavery, the protection of the rights and usages of primitive and simple folk against reckless exploitation, and the chance of gradual improvement and emancipation from barbarism. But to all alike, to one quarter of the inhabitants of the world, it has meant the establishment of the Reign of Law, and of the Liberty which can only exist under its shelter." Ramsay Muir, *The Expansion of Europe*, p. 289.

The welfare  
of humanity

government that is to be maintained, who shall administer it, and what public policies shall guide its action.

It does not need to be argued that in forming ethical ideals the welfare of humanity is a higher good than the welfare of a particular group of human beings. This means that a true patriotism transcends state limits and demands that the people of any one State should be willing to sacrifice its special interests to those of the family of States, or even, in certain cases, to the interests of some other individual State. It might thus seem that what is ordinarily known as patriotism—the love for and readiness to make sacrifices for one's own State—is greatly weakened if not destroyed.

Nationalism  
and Inter-  
nationalism

If, however, we properly regard the matter, this is not so. It does mean that international relations should be raised to an ethical plane higher than that upon which they are ordinarily dealt with, and that the old motto: "My country, right or wrong" is an essentially immoral one. But it does not mean that in any stage of civilization which we can picture to ourselves individual States, as distinct and legally independent political powers, will not have important functions to perform in the promotion of humanity's welfare; and, as long as this is so, the different States of the world are entitled to the legal support of their citizens, and those citizens will find abundant opportunity for the display of a love for their own State, and a willingness to make sacrifices in its behalf. But if they are truly patriotic and enlightened they will strive for a national greatness which at the same time advances the true welfare of all humanity, of unborn as well as of existing generations of men.<sup>1</sup>

The term "liberty" is applied to nations or to States as well as to individuals. A nation or a people is said to be

<sup>1</sup>This is the theme of writers on a League of Nations. See C. D. Burns, *The Morality of Nations*; Woolf, *International Government*; Duggan, *The League of Nations: The Principles and the Practice*, and authors there referred to.

free when it has a government of its own choosing; and a State is said to be free when it is not subject to the authority or control of another State. This last is a topic which falls within the field of international law and politics and is not appropriate for treatment here.

**National  
Liberty**

The ethical right of one people forcibly to subject to its political authority another people, that is, to destroy the sovereignty of its State and annex its territory as, for example, the right of the United States to control the political destinies of the Filipinos, or of England to extend her authority over the peoples of the South African republic (Transvaal), and the Orange Free State—is a somewhat different question from that of the right of a particular government to exercise a control over its own citizens. There is an exceedingly strong presumption not only that a given people best knows its own interests and the means of advancing them, but that, stimulated by the consciousness of national independence, it will develop its latent potentialities much more rapidly and effectively than when subjected to an alien authority. But this presumption, however strong, is one that may be rebutted. It may be made sufficiently plain that a people, because of a lack of intellectual and moral development or a deficiency in natural ability and temperament, is not able either to perceive its own best interests or so to govern its conduct as to realize them when perceived, or, in determining upon its domestic and foreign policies, to give sufficient weight to the moral and legal rights of other States and their citizens. The interests of civilization are superior to those of any particular people.

Judged from this general standpoint, it may, therefore, often happen that the forcible subjection of one people to the political rule of another is justified. This, of course, appears most plainly in the case of the subjection of an uncivilized people to a civilized nation, but is not necessarily limited to such a case. The continued unsatis-

**The Right of  
Intervention**

factory political conditions existing among many peoples of South and Central America, and the races inhabiting the Balkan Peninsula and the whole of the Turkish dominions certainly furnish to the other States of Europe and America a very strong basis of right for intervention.<sup>1</sup>

#### TOPICS FOR FURTHER INVESTIGATION

Society, the State, and Government.—Willoughby, *The Nature of the State*; Jenks, *The State and the Nation*; Garner, *Introduction to Political Science*; MacNiver, *Community: A Sociological Study*; Lewis, *The Use and Abuse of Political Terms*; Burgess, *Political Science and Constitutional Law*; Bosanquet, *The Philosophical Theory of the State*; Laski, *Authority in the Modern State*; Burns, *Government and Industry*.

The Political Importance of Nationality.—Duggan, *The League of Nations*; Toynbee, *Nationality and the War*; Muir, *Nationalism and Internationalism*; Zimmern, *Nationality and Government*.

Political and Legal Sovereignty.—Dicey, *The Law of the Constitution*; Willoughby, *The Nature of the State*; Brown, *The Austinian Theory of Law*; Laski, *Authority in the Modern State*.

The Moral Right of Revolution.—Merriam, *American Political Theories*; Willoughby, *The Nature of the State*; and see above, p. 28.

The Legal Nature of International Law.—Hershey, *Essentials of International Public Law*, and references; Willoughby, *The Nature of the State*, and see above, p. 22.

Dual Nationality.—Flournoy, "Dual Nationality and Election," *Yale Law Journal*, April and May, 1921; Garner, *International Law and the Great War*; and articles in the *American Journal of International Law*, 1915.

<sup>1</sup>See Martin, *The Policy of the United States as Regards Intervention* (Columbia University Studies, Vol. XCIII) and Hershey, *Essentials of International Public Law*, p. 148 and references.



## CHAPTER III

### THE SPHERE OF GOVERNMENT

MANY political writers have sought to fix absolute limits to the ethical right of a State to exercise its authority over the lives and actions of its citizens. This they have done by asserting the existence of certain so-called natural and inalienable rights which are declared to inhere in each human person as a rational and moral being, and which, therefore, constitute a domain of life into which, under no conceivable circumstances, is it ethically justifiable for the State to extend its coercive control.<sup>1</sup>

Natural  
Rights

It is believed, however, that what has been said in the preceding chapter as to the rightfulness of political authority in general is sufficient to show that no such "natural rights" can be said to be possessed by individuals, conceived of as existing without any sort of political authority over them. With the overthrow of this premise, the doctrine falls to the ground that there are certain absolute limits to state control which, from the ethical standpoint, may never be transcended. The reasoning of the preceding chapter is also sufficient to destroy the theory which, in earlier years, was frequently put forth, that there is some one form of government which may be described as ideally the best, and therefore one which all people should strive, as near as may be, to obtain.

Ideal form  
of govern-  
ment

<sup>1</sup>For criticisms of the theory of natural rights, see Maine, *Ancient Law*, Chap. III; Ritchie, *Natural Rights*; Green, *Lectures on the Principles of Political Obligations*.

There is a curious revival of natural law in the theory of Duguit that there exists a *droit objectif* which is binding on courts and is superior to positive law and lawmakers. This *droit objectif* is a socialized natural law. The data of social interdependence and solidarity imply the existence of a body of rules which are law, before they are enacted by an organ of the government. See Duguit, *Law in the Modern State*, Chap. II, and Brown, "The Jurisprudence of M. Duguit," *Law Quarterly Review*, April, 1916.

State has  
no ethical  
limits

The futility of these attempts to set fixed and absolutely inviolable ethical limits to state authority and to determine for it a form of governmental organization which, under all conditions of time and place and people, is the best possible form, is made evident when we recognize that every State is an institution of human invention, and the government a purely human contrivance, established and operated as a means to secure an end—the welfare of those who are responsible for its creation and maintenance.

And no  
mystical  
attributes

When the maintenance of the political life and governmental form and activities of a particular State are thus placed in their proper position as nothing more than means to an end—means that are within the possible control of every people, and determined by ends which their own reason supplies—the State is at once stripped of all mystical and transcendental attributes. It takes its place among the other instrumentalities which men create and control for their own welfare. Being thus amenable to utilitarian considerations, it lies within the duty, as it is within the power, of every people to establish for themselves those political institutions, and to authorize those activities, and that range of coercive control upon the part of their State, which seem to them the best suited to their own peculiar needs and capacities.

Methods of  
coercion

Although there are thus no *a priori* or absolute limits to the activities that may be undertaken by the State, there are, of course, certain spheres of conduct into which, from their very nature, political control cannot enter. The coercion which a State exerts over individuals is, in the last resort, one of force, and it is made successful by the sheriff, the police, or the military. The penalties which may thus be imposed and enforced extend to the deprivation of life, of personal liberty, or of the possession and use of property, to capital punishment, imprisonment, and the imposition of fines and pecuniary penalties. They may also include the

infliction of personal pain, as by branding or whipping, or mutilation—penalties which, however, are not now often inflicted in civilized communities.

So far as the threat of their imposition operates as a deterrent, these forms of coercion appeal to the self-interest of man. Over the beliefs and motives and desires of men they can exercise no influence. The rules of conduct which the State, in its Laws, lays down may appeal to the reason or conscience of the individual as just and expedient, but the penalties which are attached to their violation can influence his conduct only in the sense that the likelihood or certainty of their imposition, or the social stigma which may attend their application, operates as a consequence to be considered in balancing the wisdom or unwisdom of a contemplated act. The individual may thus be led to act otherwise than he would have acted if the State had not threatened these consequences. But the beliefs of the individual as to the morality or wisdom of an act, divorced from the consequences artificially attached by the State to its commission, cannot be affected.

Limits of  
coercion

Furthermore, by reason of the manner in which legal liability must be determined, as well as by reason of the forms of coercion to which it is limited, it becomes practically impossible for the State to take cognizance of anything but the outward act of the individual—which includes, of course, the spoken or written or printed word. The intention of the individual the tribunals of the State may often discover with reasonable certainty. That is, it may be made fairly evident whether a given act was deliberately willed by the one committing it and the result one that he intended to bring about, and, in the light of these ascertained facts, the State may take such action as it may see fit.<sup>1</sup> But the motive of the agent—that is, the

Only out-  
ward acts

<sup>1</sup>It is convenient thus to speak of the State as wishing or willing or doing a certain thing. Of course what is meant by such expressions, when used, is that those who determine the policies of the State or control its Government, are the real, responsible agents. It has been earlier pointed out that the State may,

considerations that led him to the commission of an intended act, or the reasons why he desired the result to which the act leads—the State can neither ascertain nor control.<sup>1</sup>

Thus it is seen that there is a considerable realm of human life into which the State by its very nature is unable to enter. Certain states of mind of individuals, so far as they can be ascertained, may be taken into consideration by the State in its exercise of control over them, but of these interior workings of the mind or conscience it can take no cognizance until they find expression in some outward act or spoken word. Thus, with regard to religious or political or other beliefs, and generally as to matters of conscience, the State is unable to exercise a control except in so far as these beliefs find fruition in the objective world.

Within the objective world in which State regulation is possible, there are, however, many things which a State will not attempt to control. This forbearance may be due to either of two causes: (1) the result to be reached will not be worth the expense or effort necessary to reach it; or (2) there will be other undesirable results which cannot be avoided, as, for instance, the causing of popular discontent or even of rebellious resistance, the discouraging of individual initiative or self-reliance, or the substitution of formal legal rules of conduct in the place of true ethical ideals.

Justice Stephen, in his stimulating work, *Liberty, Equal-*

for juristic purposes, be regarded as a person, but in no case can a personality be ascribed to it which would make of it a being that can will or be held to moral accountability.

<sup>1</sup> On the relation between this principle and the Espionage Act, see Chaffee, *Freedom of Speech*, Chap. II. "When the public is interested, bad motives ought not to deprive it of the benefit of what is said. Opposition to governmental action through discussion, like opposition to private action through law-suits, is the alternative to the use of force. If the law should require litigants to have good motives, it might as well shut up the courts. In the same way, truth is truth, and just as valuable to the public, whether it comes from the most enthusiastic supporter of the war or from a pro-German, and in order to get the truth, conflicting views must be allowed." (p. 63).

No control  
of con-  
science

Reasons for  
forbearance



*ity, and Fraternity*—written in criticism of John Stuart Mill's *Essay on Liberty*—lays down the following rules governing the propriety of the exercise of control by the State, or, indeed, of any other form of coercion. These are: (1) that the result to be reached is a truly desirable one; (2) that the means employed are such as will secure the result; and (3) that the cost or other evils attendant upon the coercion will be more than compensated for by the benefits secured.<sup>1</sup> These rules are sound and applicable in all cases. Mill, in his famous essay, attempted to establish the general principle that "the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant." It is generally recognized, however, that in this attempt Mill failed, and, indeed, he was himself forced to make exceptions to its application which utterly destroyed the absolute character which he ascribed to the principle.<sup>2</sup>

Stephen  
and Mill

But if an absolute line cannot be drawn between those powers which it is ethically justifiable for the State to assume, and those which it may not, it yet remains true that there is a distinction between those functions which it is wise that the State should undertake to perform and those which, under given circumstances, it is unwise that it should attempt to perform.<sup>3</sup> It would seem, however,

Wise and  
unwise  
functions

<sup>1</sup> 2nd ed., p. 54.

<sup>2</sup> For arguments in favor of extreme individualism, see Lilly, *First Principles in Politics*, Chap. IV; R. K. Wilson, *The Province of the State*; Cecil, *Conservatism*; Herbert Spencer, *Social Statics*, and Donisthorpe, *Individualism*, Chap. III.

<sup>3</sup> "What things are best done by the State and the individual respectively? How far is the State justified in controlling the actions of the individual citizen in his own or the general interest? Within what limits is it wise to allow individuals to work out their own salvation on their own lines? How far, if at all, is the State called upon to promote morality and religion? Should the industrial system of the community be State-owned, or merely State-regulated? If the latter, what degree of regulation is desirable?"

"The history of politics in the nineteenth century is the story of an endeavour to provide a provisional solution of the problems just indicated. The results of that endeavour can be seen in innumerable statutes which testify to a legislative

Essential  
duties of  
the State

that there are a certain number of powers that any State, if it is to exist at all, must exercise. These powers have been termed the essential functions of the State. A careful examination will show, however, that these duties, which are essential to every State, whatever its form and the character and civilization of its people, are comparatively few in number. For each given State there may be a considerable number of functions the performance of which is essential to it; but for every possible form of State life the number is not great. Indeed it may be said that these absolutely essential duties do not extend beyond the maintenance by the State of its territory against foreign attack, and the preservation of its own authority against domestic rebellion, and these primary duties, of course, carry with them the right to require the people, or certain classes of them, to give their armed assistance and such pecuniary aid to the State as may be necessary.

Defence and  
Taxation

Until comparatively modern times, however, States had their own domains and other special sources from which they were able to derive the revenues necessary for them, and they were therefore not obliged to resort to taxation in the sense in which that word is now used. As regards their military needs, the States were able to obtain the voluntary aid of certain military classes who made war their profession, or to procure mercenaries from other countries. And, of course, the military needs in former years were by no means so great as they now are in the greater States of the world. Huge standing armies and great navies are a modern development of political life, and universal liability to military service dates from the nineteenth century. France, during the Revolutionary Period, was the first

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activity without parallel in the whole range of history. . . . Can we discover in the legislation of the nineteenth century the predominating influence of any one ideal?" So far as British politics are concerned, the author answers the question in the affirmative and suggests the ideal of liberty. Brown, *The Underlying Principles of Modern Legislation*, p. 37.

country of the world to call all her able-bodied men to arms. And almost equally modern is the reliance by the State upon the various forms of taxation as the usual and main source of necessary public revenues. The important part played in the development of representative government by the necessity of autocratic rulers to resort to the people for financial aid will be referred to in a later chapter.<sup>1</sup>

The history of the development of political institutions also shows that only gradually have States attempted the direct exercise of what are known as judicial and legislative functions. In all governments of a primitive or undeveloped type the practice is universal to permit disputes between private individuals to be settled in some way by themselves—either by self-redress, by family councils, by trade guilds, or in some other unofficial manner. By degrees the central political authority takes under its protection certain rights, and for others provides tribunals before which disputes regarding them may be taken. At first it is optional whether or not the individuals will resort to these tribunals and, furthermore, the judgments, when rendered, are not enforced by the State, but left to the individuals concerned. Refusal to abide by their judgments, however, often leads to the outlawry of the ones so refusing, with a result that they no longer have any right to the State's protection against violence, and thus anyone's hand may with impunity be raised against them, except, of course, so far as they themselves may be able to protect themselves.

The next step in the growth of judicial functions in the State is to make compulsory the resort to the tribunals created for the adjustment of private disputes, and the provision of state officers whose duty it is to see that the de-

The State as  
arbiter

Compulsory  
adjustment  
of disputes

<sup>1</sup>Cf. Jenks, *The State and the Nation*, Chap. XIII. For the importance of the power of the purse in English constitutional history, see Anson, *Law and Custom of the Constitution*, Part I



crees of these courts are obeyed.<sup>1</sup> Thus is reached the condition which now prevails in modern developed political communities. It is still true, however, that, even in these States, the government does not take cognizance of many wrongful acts committed by one individual upon another until the injured one brings a suit in the courts of law. These are the suits, based upon contract or wrongful acts called "torts," for the possession of certain pieces of property, the ownership of which is disputed, for the specific performance of contracts legally entered into, for compensation for damages suffered by reason of breaches of contract or the commission of some other illegal acts, etc. It is only when the act of an individual crosses the line that distinguishes a civil tort from a crime, that the modern State itself takes notice of it and institutes proceedings in its criminal courts for the punishment of those who have disobeyed its commands.

The line which divides these civil torts from penal acts, though an absolutely definite one, is not logically determined by any peculiarities in the acts themselves. What may be a tort in one country is made a crime in another country; and, in the same country, what may at one time be deemed a civil wrong may at another time be transformed into a crime by having attached to its commission a penalty which the State undertakes to enforce. And it may be further observed that an act which furnishes the basis for criminal proceedings also furnishes a ground for a civil suit for damages by any persons who may have been substantially injured by it. In some countries, indeed—in France, for example—the civil damages may be assessed in the same suit that the criminal penalty is imposed.<sup>2</sup> In most countries, however, a separate civil

Torts and  
Crimes

The practice  
in France

<sup>1</sup>For a discussion of this point with particular reference to an analogous development among nations, see Scott, *The Two Hague Peace Conferences*, Vol. I, p. 190 ff.

<sup>2</sup>Garner, "Criminal Procedure in France," *Yale Law Journal*, Vol. XXV p. 255 (February, 1916).



judicial proceeding for the recovery of pecuniary damages is necessary. The entrance of the State into the legislative field for the creation of law for the regulation of personal and property relations of individuals to one another has been more recent than its assumption of judicial functions.

Rules of  
private law

In the domain of what is known as public law, that is, the body of rules determining its governmental organization and operation, the State of necessity has at all times played an important, if not an almost exclusive, creative part. But in all commercially and industrially undeveloped communities the political authority has been content to leave to custom, that is, to the more or less free choice of the people, the creation of the rules by which their private lives and business interests are to be regulated. And it is only as commerce and industry have developed and social and economic life has become more complex that the State has found it necessary, by formal legislative enactments, to determine, in a measure, what the private law of the people shall be.

Developed  
by custom

The assumption by the State of this legislative function has been a very recent phenomenon. Not until the nineteenth century was its exercise frequent, and, at the present time, in England and the United States and in all those countries which live under what is known as the English "Common Law," the great body of the private law is not found in formal legislative enactments, but in recognized customs and the principles laid down by the courts. Even in those countries which have enacted comprehensive bodies of private law, known as Codes, the principles thus legislatively declared have been in large measure first developed by customs of the people or by declarations of the courts.<sup>1</sup>

Only re-  
cently  
determined  
by State

The paragraphs which have preceded have been sufficient to show that, as an absolute proposition, the powers that are essential to the existence of State life in its less

<sup>1</sup>See Holland, *Jurisprudence* (3d. ed.), p. 48.

Essential  
powers not  
numerous

developed forms are not many in number. They do not necessarily include, as we have shown, the creation of private law, the settlement of private disputes, or the exercise of such an important power as that of taxation. These powers are, however, essential to the modern civilized State, and to these, as equally necessary, may be added other powers, such as those of taking private property for a public use (eminent domain), the construction and operation of certain public works (Rome found it necessary to construct great public roads), the maintenance of a department of foreign relations, and the enforcement of a great variety of police regulations.

Adam Smith's treatise on Political Science was entitled *Lectures on Justice, Police, Revenue, and Arms*. These subjects, for his day adequately indicated the scope of state authority, but at the present time—even apart from the abnormal control of the war—governments have become vast public service companies. All modern States now exercise powers which cannot be fairly termed essential, their assumption being dictated by considerations of expediency rather than of necessity. These are so numerous and differ so much in different States that even a partial enumeration of them will not be attempted. In general they may be described as the "common welfare" functions, and include all those state activities which have for their aim, not the maintenance of domestic order, but the promotion of the economic, industrial, intellectual, and moral interests of the people. They are assumed by the State because it is believed that, if left to private performance, they would either not be done at all or not done so well.<sup>1</sup>

These non-essential functions of the modern State may

<sup>1</sup> These functions are adequately described by Emil Davies, *The Collectivist State in the Making* (new ed., 1920): "The State or Municipality as coal-owner, house proprietor, bread, milk, and meat retailer, drugstore keeper, undertaker, banker, pawnbroker, farmer, restaurant proprietor, general store keeper, and a thousand and one other things covering practically every department of life."

Non-  
essential  
functions

be divided into two ranges—those that are socialistic and those that are non-socialistic. The word “socialistic” is here used with a somewhat special signification, as referring to those instances of state control the effect of which is to subject to public regulation matters which, if not so regulated, could and would be exercised by private individuals or regulated by their voluntary coöperative effort. By non-socialistic functions are meant those functions which, if not exercised by the State, would not, even though they could, be exercised at all. The effect of their assumption by the State is, therefore, in no wise to diminish the sphere of individual enterprise. Instances of this class of state activities are the execution of certain great public works, the collection and dissemination of special kinds of information, and, in most cases, the establishment and maintenance of libraries, museums, public parks, public baths, playgrounds, and comprehensive systems of schools and higher institutions of learning and research. States exercise their control either by way of direct establishment and operation, or by the laying down of rules in accordance with which private individuals or corporations shall conduct themselves or carry on their business concerns.<sup>1</sup>

These regulations, though mandatory and coercive in character, cannot be said, in many cases, to restrict the

Socialistic  
and non-  
socialistic

Public  
works

<sup>1</sup> Thus Professor Dicey writes: “Wealthy Englishmen have made a much less vigorous resistance to socialistic legislation than would have been expected by the statesmen or economists of sixty years ago. . . . In truth a somewhat curious phenomenon is amply explained by the combination of an intellectual weakness with a moral virtue, each of which is easily discernible in the Englishman of to-day. The intellectual weakness or failure is the indolent assumption that the effect of apparently great legal or political changes is, in the long run, very small. This view is suggested by the superficial reading, or the more superficial memory of English political history from the accession of George III (1760) to the accession of George V (1910). During these one hundred and fifty years almost every legal change, whether entitled reform or revolution, has produced far smaller results than were anticipated by their advocates or by their opponents. Catholic Emancipation, 1829; the Reform Act, 1832; the establishment of Free Trade, 1845; the line of Factory Acts, extending from 1802 to the present day; the democratic extensions of the Parliamentary suffrage, which received their latest, although not probably their final development in 1884, have not to all appearance revolutionized the condition of England. They have not led to conditions of sanguinary violence, nor given rise to reactionary



sphere of competition between individuals. They leave this competition to operate in its full force, but provide that the struggle shall be carried on under certain prescribed conditions. Their effect is to raise the contest to an ethically higher or economically better level. Thus an eight-hour working-day law, when applicable to all industrial establishments of a certain class, does not curtail the competition between the individuals or companies who operate those establishments, but it does say that their competition shall not involve excessive daily toil upon the part of the laborers.

The Police  
Power

Recent years have seen in modern industrial States a great increase in this sort of regulation, provided by the State in the exercise of what is called its "police power."<sup>1</sup> It is under this head that are included the many laws dealing with matters of sanitation, good morals, industrial efficiency, and the securing to the public of adequate impartial services and reasonable rates by what are called "public utility" companies and industries which, to introduce a term used by the Supreme Court of the United States, are "affected with a public interest." These "public utilities" and industries "affected with a public interest" include railways; street-car lines; gas, electric-light and power and water companies; telephone, telegraph, express, insurance, and grain-elevating corporations.<sup>2</sup>

Public  
Utilities

It has been pointed out that the state control and regulation of which we have been speaking does not operate in

legislation which has done so much to delay the course of peaceful progress in France. Hence the homely and comfortable but delusive doctrine that in the political world 'nothing signifies.' The high moral virtue which tends accidentally in the same direction as a kind of intellectual apathy, is the daily increasing sympathy in England with the sufferings of the poor." *Law and Opinion in England* (2nd. ed.), p. lx.

<sup>1</sup> For this tendency in England see Dicey, *Law and Opinion in England*, Lectures VII and VIII and the introduction to the second (1914) edition; Brown, *The Underlying Principles of Modern Legislation*.

<sup>2</sup> For the development in the United States, see Beard, *Contemporary American History*; Willoughby, *Constitutional Law of the United States*, Vol. II, p. 856 ff; and the materials collected in Orth, *The Relation of Government to Business and Property*.



a socialistic way to destroy competition and restrict the sphere of individualistic effort. There are other ways in which States may extend their restraining authority, the aim and result of which are not simply to maintain competition between individuals upon a certain plane but to make possible and even to increase the potency and intensity of competitive conditions. This is illustrated in those attempts which States have made to prevent the rise or to restrain the power of great monopolistic or dominating industrial concerns which by their very size or by either natural or artificial advantages are enabled to crush competition or deter it from springing up. It cannot be claimed, however, that in all cases it is wise for the State thus to attempt to maintain or restore competitive conditions, for it may be the part of wisdom to permit these large organizations to exist but to regulate the rates that they may charge for services or commodities and to fix the qualities of those services and the general conditions under which they shall operate.<sup>1</sup> This is a question which cannot be here considered. The point here made is that the state action which renders impossible or curtails the powers of these monopolistic concerns has for its aim and result an increase rather than a decrease of individualism.

**The State  
and industry**

So, also, when the State by law prevents ecclesiastical organizations or labor unions, or any other societies or associations from exerting an undue control over their members, the result may be an increase rather than a diminution of individual liberty. Indeed the same may be said of a great part of private law which seeks to render persons secure in their lives, the possession and use of their property, and the pursuit of happiness. The protection which the individual thus enjoys guarantees to him

**Control of  
associations**

<sup>1</sup>The issue figured in the American presidential campaign of 1912. See Wilson, *The New Freedom*; Dewitt, *The Progressive Movement*, and Ogg, *National Progress: 1907-1917* (American Nation Series).

in fact a far wider realm of liberty than he could possibly enjoy in a non-political state of society.

In foreign countries, among which Germany is conspicuous, and within very recent years in the United States, there has been shown a tendency for the State to extend its controlling influence beyond the limits of the spheres of action which have thus far been referred to. This extension has taken the form of the attempt by public authority to advance beyond the protection of those property interests which individuals have managed to secure for themselves in the competitive struggle of industrial life, and beyond even the making of efforts to compel competition to be waged in accordance with certain rules and upon an elevated plane of morality and humanity. In the state control to which reference is made the attempt is to produce by law the affirmative result that men and women shall receive those amounts of economic goods to which they are justly entitled—in short to establish, to an extent at least, a régime of “social justice.” This has meant that the States have advanced beyond the exercise of their “police powers” and have commanded that the stronger contestants in the commercial and industrial struggle shall make certain concessions or certain payments to the weaker members of society. Stated in other words, this means that the competitive balance has had certain weights placed by law upon one side; the weaker contestants receive handicaps in their favor.

To some extent this result has followed from functions which for many years States have been accustomed to exercise—in the furnishing of public poor relief, in the legal protection extended to minors, to women and to defective classes, and in the provision of free education and other public benefits in which the poor participate but which are paid for in considerable measure by the property owners who, by their taxes, furnish the revenues of the States. But the state action to which reference is now

Extensions  
of state con-  
trol

Social  
Justice

made is more radical than this.<sup>1</sup> It is not limited in its application to cases of absolute destitution nor to the provision of public benefits which are open to enjoyment by rich and poor alike. Its aim is to bring it about that, in a measure at least, the wage earner shall receive a "fair wage," one that is commensurate with the value of his labor and sufficient to maintain him and his family in a reasonable degree of comfort according to the minimum standards which, in his country, are fixed for a decent civilized life.

It is an aim such as this which has dictated what are known as "compulsory workmen's compensation laws." These provide that a workman when injured in the course of his employment shall be paid a reasonable sum by his employer irrespective of the fact whether his employer has by any act of his own contributed to the injury, or even of the fact whether the injured one has himself been guilty of contributing by his negligence to the occurrence of the accident by which he has been injured. Thus the so-called compensation which is paid is not based upon any doctrine of contract between the employer and the employee, or upon any basis of legal wrong done, but upon the idea that it is socially just and expedient that the great mass of the wage-earners of the State should be thus aided. Looking at the matter broadly, it is felt that most of the injuries sustained by the workers are, humanly speaking, unavoidable, and that their cost should be charged to the employments in which they are sustained, and ultimately to the consuming public. The argument is that where the employers make the accident payments directly, or through state-administered funds to which they are compelled to contribute, the cost is by them charged to the operating expenses of the industries which they conduct, and thus tend to increase the price of the products to those who purchase and consume them.

The right  
to a living  
wage

Workmen's  
Compensa-  
tion

<sup>1</sup>See generally, Commons and Andrews, *Principles of Labor Legislation*.

Justification  
of state  
interference

The effect is thus to shift the economic burden of these accidents from the shoulders of those upon whom in the first instance they happen to fall, and who may indeed have by their negligence been more or less personally responsible for them, to the shoulders of their employers who have been without either moral or legal fault, or upon the public in so far as these employers may be able, by an enhancement of the prices of their commodities, to shift it upon the consuming public which has been equally without moral or legal fault. The only justification for the state compulsion thus exercised, but one that is generally felt to be fully sufficient, is that social justice and expediency demand that the wage-earning class should thus by law be given this special assistance in order that, to this extent at least, their weakness in the struggle for economic goods shall be compensated for.<sup>1</sup>

State insur-  
ance and  
pensions

Of a character similar to these workmen's accident compensation laws, as regards the principles of social justice by which they are dictated, are compulsory or state-aided schemes of insurance and pensions to correct suffering and destitution arising from old age, sickness, and unemployment. In so far also as consumption taxes are laid upon luxuries rather than upon the necessities or ordinary conveniences of life, and inheritance or income taxes are progressively increased in rates according to the amounts of property or income involved, there is a conscious effort to bring about a more equitable distribution of wealth than is secured by the ordinary operation of competitive forces.

The paragraphs which have preceded furnish an introduction to the subjects of Socialism and Communism, both of which are names given to doctrines regarding the part which the State should play in controlling the economic and social life of its citizens. Both are founded upon an assertion of the injustice or inexpediency of the régime

<sup>1</sup>Powell, "The Workmen's Compensation Acts," *Political Science Quarterly*, Vol. XXXII, p. 542 (December, 1917).



which prevails in all civilized countries, according to which land and the other instruments of production are privately owned and operated with a result that the industrial community is divided into the two classes of wage-earners and income-receivers, with the consequence, as their adherents contend, that the wage-earners do not receive a fair return for their labor, and that a relatively few individuals come into the possession of amounts of wealth far in excess of their reasonable needs or just deserts, while the first mass of workers remain without the means to meet their absolute needs.<sup>1</sup>

This unjust distribution of economic goods which results from the operation of the competition of the industrial world, as it exists under the present protection of the law, causes, it is claimed, most of the other social evils which affect modern society. And these evils, it is declared, can be only slightly ameliorated by the forms of state control to which reference has been made in earlier parts of this chapter. For their substantial correction, it is argued, it is necessary that the whole system of private ownership of property, and especially the instruments of production, should be abolished or radically altered.<sup>2</sup>

Some persons, like the followers of Henry George, hold that sufficient relief can be obtained through a "single tax" upon land values which will operate to return to society—that is, to the whole body of the people—those parts of the present values of land which have been due to social action as contrasted to the improvements which have been due to the efforts or expenditures of their owners; and that, similarly, such future "unearned increments" of land

More  
radical  
proposals

The Single  
Tax

<sup>1</sup>See Willoughby, *Social Justice*, Chap. I, and R. H. Tawney, *The Acquisitive Society* (1921).

<sup>2</sup>But compare the following definition: "Any legislation which attempts the equalization of social conditions—that is, such as involves interference by the State beyond the limits at which that interference is necessary to secure equal liberties or equal opportunities—is socialism." Bruce Smith, *Liberty and Liberalism*, p. 618. For an admirable survey of the literature, see Beer, *History of British Socialism*, Vol. II (1920).

values shall be conserved to the public which, it is claimed, produces them. Some of the advocates of the "Single Tax" however content themselves with urging that past unearned land values be disregarded and only future socially created increments be reserved for the public benefit.<sup>1</sup>

A true Socialist, however, is one who regards land as but one of the instruments of production, the ownership of which is responsible for the present unjust distribution of wealth among the people. He therefore holds that the State should assume the ownership of all the instruments of production, including factories, workshops, mines, railways, etc., and operate them through its governmental agencies. This means, of course, that the products which are created shall be apportioned among the workers and others according to certain canons of distributive justice which are deemed inherently just. All Socialists are not agreed as to what these principles of distribution should be. Some have held that every worker should receive a share according to the amount he has actually produced by his labor—conceding that this can be determined, which, in most cases, is practically impossible. Others have held that he should receive according to the amount of effort he has expended, irrespective of the actual result of that effort. Still others have argued that each should receive according to his real needs.

Involved in this socialistic scheme of production is, of course, the necessity of compelling individuals to expend their best efforts in aid of production and thus we find very frequently stated as the socialistic motto: "From everyone according to his ability, and to every one according to his needs."<sup>2</sup> It is not necessary to say that a socialistic régime, if inaugurated, would require an extension of state activities<sup>3</sup> far beyond that exercised by any modern

State  
Socialism

Difficulties  
of admin-  
istration

<sup>1</sup>See A. N. Young, *The Single Tax in the United States*, and authorities cited.

<sup>2</sup>See Willoughby, *Social Justice*, especially Chapters V, VII, and IX.

<sup>3</sup>On the difficult question of bureaucracy and nationalization see below, p. 188. For an argument insisting that bureaucracy is the antithesis of liberty, and that

State, and would therefore require, to be successful, the elaboration of a perfected administrative machinery.

The socialistic ideal is not necessarily bound up with any particular form of government. In fact, however, Socialists everywhere support those forms of government which are amenable to control by the popular will; and this is not unnatural, inasmuch as the fundamental premise of Socialism is that government should exist for the exclusive benefit of the governed, and is warranted in assuming any power or function which will subserve this end. Monarchy may be retained, but it must be one which is obedient to the people's will.

Socialism  
and  
Government

In what has been said regarding Socialism there has been no intention to determine whether or not its doctrines are sound. The subject has been considered only because of its political implications. It may, however, be said, that it is not possible to deny the premise which lies at the basis of their reasoning, namely, that governments justify their existence only in so far as they promote the interests of the governed, and that, as has been earlier pointed out, there is no valid *a priori* reason why the State should not recognize any function or form of control which may be truly said to promote the welfare of the people.

No *a priori*  
objections

A Communist is one who, with regard to the sphere of state action, advances beyond the position taken by the Socialist and argues that the interests of the people will be best promoted if all or nearly all forms of property are owned and enjoyed in common by all the people. In addition to this economic communism, there is usually the doctrine that in matters of family and other social relationship, community life should be substituted for the individualism which at present prevails.<sup>1</sup>

Communism

Socialism would mean a marked conservative reaction, a static State with unlimited power, see Oliver Brett, *A Defence of Liberty* (1921).

<sup>1</sup>The principles of communism are fully treated in the literature on Bolshevism. See particularly, Postgate, *The Bolshevik Theory* and books referred to. Of interest also are Russell, *Proposed Roads to Freedom* and *Bolshevism in Theory and Practice*.



**Anarchism**

There are a certain number of thinkers, termed Anarchists, who hold that all forms of governmental control are without an ethical justification, and urge, therefore, that voluntary coöperation between individuals should be substituted for the coercion which the State exercises.<sup>1</sup> These Anarchists are divided into different schools, according to the methods which they think should be employed in order to bring about the non-political régime which they favor. They are also in disagreement as to what forms of coöperation would be feasible or justifiable in case all law and political authority were abolished.

The invalidity of the anarchistic premise that all government is an evil has been sufficiently shown in what has earlier been said with regard to the right of the State to exist and of the legitimate sphere of its control. Nevertheless, as Professor Jethro Brown points out, there are several important truths underlying the anarchist doctrine. These are first, that, "although the anarchist may be wrong in his remedy for existing social ills, he is fundamentally right in insisting upon their reality and gravity." Wars, inequalities of wealth, and poverty are sinister facts, to be met by action rather than argument. "Anarchism confronts our sense of citizenship with a challenge which we should do well to take seriously," and "the believer in political institutions should seek to make them more worthy of popular allegiance."

**Value of anarchistic doctrine****1. Criticism of existing conditions****2. Importance of self-government**

Secondly, "although the anarchist may be wrong in thinking that men can afford to dispense with the controlling influence of the State, he is fundamentally right in insisting upon the importance of self-government as an ideal to the realization of which the efforts of the ruling powers

<sup>1</sup>As defined by Huxley, anarchy is that form of society "in which the rule of each individual by himself is the only government the legitimacy of which is recognized . . . which abolishes collective government, and trusts to the struggle for existence modified by such ethical and intellectual considerations as may be freely recognized by the individual, for the *modus vivendi* in which freedom remains intact, except so far as it may be voluntarily limited." "Government: Anarchy or Regimentation," *Collected Essays*, Vol. I, pp. 393 and 419.



should be directed. Political institutions are necessary as a means to realizing the conditions through which the better self can become conscious and operative among men; but this end can only be attained when the institutions are so framed as to enable and teach men to govern themselves. When the anarchist bids us resist all forms of tyranny, and think for ourselves instead of taking our rule of life from the State or public opinion, he is declaring a message of which our generation stands much in need."

Again, "we might borrow with advantage something of that faith in man's responsibility to the call of the good which, though often associated with foolish extravagances as it is presented to us by exponents of anarchy, has formed part of the message of the world's greatest teachers. . . . What is lacking is a recognition of the immense possibilities of a policy that shall subordinate punishment to the purpose of reforming the character of the wrong-doer, and shall not overlook the value of other means for promoting this purpose—especially the appeal to higher impulse."

Finally, Professor Brown suggests that the services of the doctrine of anarchy are not confined to the principles which it positively stands for. "Perhaps its supreme service is to be found in its challenge to traditional assumptions in politics—to somnolent convictions, or, as Mill would say, 'to the deep slumber of decided opinion.' Anyone who has faced that challenge fairly, and has sought to balance its strength and weakness, will approach the study of the principles of legislation with a new interest and a wider outlook."<sup>1</sup>

3. Faith in human nature

4. Challenge to political principles

#### TOPICS FOR FURTHER INVESTIGATION

The Limits of State Interference.—Adams, *The State in Relation to Industrial Action*; Menger, *The Right of Labor to the*

<sup>1</sup> *The Underlying Principles of Modern Legislation*, pp. 31-33. The whole chapter is very sane and suggestive. See also Russell, *Proposed Roads to Freedom*, Zenker, *Anarchism*, and Kropotkin, *Modern Science and Anarchism*.

*Whole Produce of Labor*; Ritchie, *Principles of State Interference*; Willoughby, *Social Justice*; Burns, *Government and Industry*.

Guild Politics.—Cole, *Guild Socialism Re-stated*; Hobson, *National Guilds and the State*; Taylor, *Guild Politics*; Reckitt and Bechhofer, *The Meaning of National Guilds*.

Syndicalism and the State.—Levine, *The Labour Movement in France*; Harley, *Syndicalism*; Macdonald, *Syndicalism*; Russell, *Proposed Roads to Freedom*.

The Increase of State Functions.—Dicey, *Law and Opinion in England* (2nd. ed.); Davies, *The Collectivist State in the Making and The State in Business*; Pierce, *Federal Usurpation*; Haynes, *The Decline of Liberty in England*.

War Controls and Experiments.—Burns, *Government and Industry*; Webb, *A Constitution for the Socialist Commonwealth of Great Britain*; Willoughby, *Government Organization in War-time and After*.

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<sup>1</sup>A brief but excellent summary of various schemes for reconstruction now being discussed, is Gollancz, *Industrial Ideals* (Oxford Press, 1921).

## CHAPTER IV

### CONSTITUTIONAL GOVERNMENT

IN THE preceding chapters it has been shown that individual liberty and political authority are correlative rather than contradictory. The establishment of a government with coercive powers does not destroy a freedom which its citizens would otherwise enjoy. It simply substitutes, in all properly administered States, a rule of law for a reign of unregulated force. As Rousseau says in his *Social Contract*, what a man loses by the establishment of political society is "an unlimited right to anything that tempts him which he can obtain; what he gains is civil liberty and the ownership of all that he possesses. We must distinguish the natural liberty, which has no limits but the strength of the individual, from civil liberty, which is limited by the General Will; and possession, which is only the effect of the force and weight of the first occupant, from the ownership which is founded only upon a positive title."

Natural  
Liberty and  
Civil Liberty

It will be observed that the term "civil liberty" is here used. The word civil is from the Latin *civis*, meaning a member of a State, and is therefore properly employed, but the word "liberty" in this connection requires some justification. The so-called liberty which the individual enjoys as a member of a political group is in one sense not liberty at all, since it is wholly created and determined by law and, from a strictly legal point of view, the citizen is potentially subject to the authority of the State in all that relates to his property and his outward acts. He has no property that may be legally called his own, except in so far as the State, through its Law, declares that a thing

The Citizen  
and the  
State

belongs to him and that it will protect him in its possession and use. His contracts have no legal validity except in so far as the State recognizes them as valid, and will, if necessary, enforce their performance or punish their violation. He is free to do or say anything only in so far as the State has said that the act or utterance is not inconsistent with the policies which its laws have declared. In what sense, then, may he be said to enjoy liberty?

Benefits  
of political  
life

The answer is that he enjoys liberty because, in the exercise of the personal and property rights which the law recognizes, he is defended by the power of the State from the interference of other individuals. The benefit which he derives from this protection far outweighs the prohibitions imposed upon him not to violate the legally established rights of others. The safeguards which a member of a political community receives from his State in the enjoyment of his legally recognized rights result in a wider realm of free and undisturbed action than would be possible if he had to rely upon his own physical strength and cunning, or the voluntary coöperation or forbearance of his fellow men. But, in order that these benefits of political life may be enjoyed as fully as possible, it is clear that such legal rights should be definitely determined and, so far as practicable, secured against violation not only by other private individuals but by those in political authority.

Security of  
legal rights

The one great problem which every politically organized people has to solve is here revealed. It is to establish and maintain a form of government which will be strong enough to perform the duties which are laid upon it, and yet so organized that those who obtain possession of its powers shall not be disposed, or, if so disposed, shall not be able, to use the authority which they have to advance their own selfish interests in disregard of, or contrary to, the welfare of the governed. This is the end sought by what is termed Constitutional Government. In a broad sense every



State has a constitutional government, that is, its government is operated according to certain fundamental constitutional principles which determine the type of government which is to exist. But, in a narrower and more common use of the word, a government is constitutional only when its operation is controlled by principles which provide a reasonable guarantee that public policies will be dictated by the interest of the governed, and that the rights of life, liberty, and property of the individual will be fixed by laws general or stable in character, and protected from violation by those in political authority as well as from interference by other private individuals.

Purpose of  
Constitu-  
tional Gov-  
ernment

Constitutional Government, then, in the sense in which the term is generally used, and in which it is employed in this treatise, means first of all a government by law and not by the arbitrary fiat or casual commands of those in authority.<sup>1</sup> To this general characteristic is also commonly added the right of the governed, or a considerable portion of them, to participate, either directly or through their freely chosen representatives, in their own government—this right being granted in order that a guarantee may exist that the wishes and welfare of the people may be known and made controlling upon those in public authority. Included in this right of self-government is usually the recognition of certain free autonomous powers in local governing bodies with regard to the special interests of the smaller divisions of the State's territory. And, finally, in many cases, Constitutional Government has come to mean that there are certain legal rights of personal liberty and the possession and use of property which are removed from the ordinary legislative control of the State. Of these constitutionally reserved rights and of the problems raised by popular or self-government we shall later have

A Govern-  
ment by  
Law

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<sup>1</sup>See President Wilson's definition, *Constitutional Government in the United States*, W. F. Willoughby's criticism, *The Government of Modern States*, p. 77, and Goodnow's discussion, *Principles of Constitutional Government*.

occasion more particularly to speak. Our immediate task will be to consider the essential and primary characteristic of a Constitutional Government as one of Law.

Constitu-  
tional guar-  
anties

Thus regarded, a Constitutional Government is one that operates under established principles, written or unwritten, and collectively termed a Constitution, which sets legal limits to the exercise of all public authority, and thus protects the individual against his own government with respect to his legally established rights of life, liberty, and the pursuit of happiness. In order that his protection may be real it is necessary that there shall exist a judiciary, free from undue executive influence, administered by able, upright, and fearless judges.

Constitu-  
tional  
morality

This judicial independence is usually secured by giving to the judges tenures of office and emoluments which are not subject to executive control. It is, however, to be recognized that no constitutional provisions can give security and power to the courts unless there is a reverence and respect for law in the hearts of the people and a firm disposition upon their part to abide by and uphold the decisions which their judges render.<sup>1</sup> Upon this point we may quote the words of the Supreme Court of the United States. In one of the most important cases which has come before it that court said:

Independ-  
ence of  
Judiciary

While, by the Constitution, the judicial department is recognized as one of the three great branches among which all the powers and the functions of government are distributed, it is inherently the weakest of them all. Dependent as its courts are for enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or sword, their power and influence rest solely upon the appeal for the assertion and protection of

<sup>1</sup>Unless, in other words, there is "constitutional morality." The phrase is that of Grote, who, describing the Athenian Democracy in the time of Kleisthenes, emphasized the necessity for "a perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be no less sacred in the eyes of his opponents than in his own." Such constitutional morality he called "a natural sentiment" as exists in the United States. Grote, *History of Greece*, Vol. II, p. 86.

rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.<sup>1</sup>

There are, then, two essential elements of a constitutional government: (1) an independent judiciary to which all may resort for the enforcement of their legal rights; and (2) an executive branch, all the officers of which have their public powers defined by law so that commands issued in excess of such powers are without legal force, and acts not sanctioned by law can be redressed by the enforcement of civil and criminal responsibility. This does not mean that public officials may not be vested with discretionary powers, but simply that the existence and limits of these powers must be fixed by law. In those monarchies which are described as constitutional, the Monarch may not himself be held liable, civilly or criminally, for what he may do, but there are always ministers or advisers who may be held responsible.

In some of the states of the American Union it is held that the chief executive, the Governor, is not amenable to compulsory judicial process, and the same doctrine applies in the national government with reference to the President. But these officials are subject to impeachment for malfeasance or non-feasance of office, and, upon conviction, may be removed from office, after which removal they may be held civilly or criminally responsible for any violations of law of which they may have been guilty. And, furthermore, they are wholly subject to the law, in the sense that orders issued by them in excess of their constitutional powers are without legal force, may be disobeyed without legal consequence, and furnish no legal justification to any inferior public official who may act in obedience to them.

This central doctrine of Constitutional Government is excellently shown in the several cases decided by the United States Supreme Court. These are cases which

**Control of  
the Execu-  
tive**

**By impeach-  
ment and by  
the courts**

<sup>1</sup>U. S. v. Lee, 106 U. S. 196 (1882).



arose under the United States Constitution but they serve equally well to illustrate the conception of Constitutional Government as applied to all States.

In the case of *Little v. Barreme*,<sup>1</sup> which was an action in trespass against a naval officer who had seized, upon the high seas, a ship, in obedience to an order of the President which the President did not have the legal authority to issue, Chief Justice Marshall, speaking for the Court, said:

**Marshall's  
views**

I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the Executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of the civil and those of military officers; and between proceedings within the body of the country and those on the high seas. The implicit obedience which military men usually pay to the orders of their superiors, and which indeed is indispensably necessary to every military system, appeared to me strongly to imply that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to perform them and who is placed by the laws of his country in a situation which in general requires that he should obey them. . . . But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in the opinion of my brethren, which is that the instructions cannot change the nature of the transaction, or legalize an act which without them would have been a plain trespass.

**United  
States  
v. Lee**

This is an excellent case, since it presented the issue in its most acute form, namely the act of a naval officer in obedience to an order of the President issued in his constitutional capacity as the Commander-in-Chief of the Army and Navy. Again, in the case of the *United States v. Lee*,<sup>2</sup> already referred to, the heirs of the Confederate General Robert E. Lee sued to recover the Arlington Estate, which had been confiscated by the United States during the Civil War and was held by an officer of the United States army. The suit was one of ejectment

<sup>1</sup>2 Cranch 170 (1804).

<sup>2</sup>106 U. S. 196 (1882).



against this officer, but the United States government intervened, through its Attorney-General, and, claiming that the estate was its property, said that the suit was, in effect, a suit against itself and therefore should not be entertained by the Court, since it is an established principle of public law that a sovereign State, such as is the United States, cannot be sued without its consent. The Court, however, viewed the action as one against the persons in actual possession of the property and held that they could not legally justify their possession, notwithstanding the order of the President and the claim that they were holding only as agents of the United States, unless they could show that the United States itself had legal right to possession. In its opinion the Court said:

The defense here stands solely upon the absolute immunity from judicial inquiry of everyone who asserts authority from the executive branch of the government, however clear it may be made that it possessed no such power. . . .

Supremacy  
of the  
Law

No man in this country is so high that he is set above the law. No officer of the Law may set that Law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the Law and are bound to obey it. It is the supreme power in all systems of government, and every man who, by accepting office, participates in its functions is only the more strongly bound to submit to that supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other but also upon the rights in controversy between them and the government.

In the case of *Yick Wo v. Hopkins*<sup>1</sup> the Supreme Court held that it is inconsistent with the very idea of due process of law that any administrative official should be permitted to exercise a discretionary power based, not upon ascertained facts that have a reasonable relation to the action

Arbitrary  
executive  
action

<sup>1</sup>118 U. S. 356 (1885).

to be taken, but upon the individual and arbitrary will of the official himself. "The very idea," says the Court, "that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails." With regard to the authority which in this case appeared to have been given to certain public officials, the Court declared: "The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint."

Protection  
of private  
rights

A second constitutional principle is closely related to that of a government of law. It requires not only that the individual be protected in certain of his private rights of life, liberty, and property, against arbitrary and irresponsible and illegal action upon the part of the executive agents of his government, but that the legislature shall not be permitted to authorize the doing of acts which in form or substance are essentially and fundamentally unjust. This limitation upon the legislative power thus relates not only to the substantive provisions of the laws which are enacted, but to the forms of procedure whereby the private rights of the individual are injuriously affected. The manner in which these constitutional limitations upon the legislative power are imposed and enforced may take a variety of forms.

Omnipo-  
tence of  
Parliament

In England, which possesses no written Constitution, the Parliament is legally absolute. This means that whatever it commands has the force of law, and must be so recognized and enforced by the courts. Such limitations as restrain its actions must, therefore, be of a moral rather than a strictly legal nature. They are, however, more or less definite and practically coercive and, in the English sense of the word, constitutional in character, so that a violation of them would be conceded to be revolutionary

in effect, and, if persisted in, regarded as furnishing just grounds for popular resistance to their enforcement.

These fundamental rights of the Englishman have been born of the fixed determination of the people displayed during the seven hundred years since the signing of the Magna Charta, to have their law so framed that what they conceive to be their fundamental rights of life, liberty, and property shall not be taken from them except by processes which exclude the exercise of arbitrary power, and which provide an opportunity upon their part to show cause, if any there be, why, in any particular case, their private rights should not be subjected to a threatened invasion by official action. To a considerable extent these constitutional rights have obtained definite statement in such formal documents as the Magna Charta, the Bill of Rights, the Act of Settlement, and the Habeas Corpus Act of 1679.<sup>1</sup> These agreements or statutes to which an especially sacrosanct character has been attached, do not, however, exhaust the constitutional limitations that restrain the legislative as well as the executive powers of government. These rights are also to be found throughout the Common Law of England, pervading its provisions and supplying the fundamental principles upon which its precepts are founded. In a sense, indeed, it may be said that the English Doctrine of Civil Liberty is found in a system of political philosophy which finds its best statement in Locke's *Two Treatises of Government*, published in 1689.

One important fact is, however, to be noticed with reference to the constitutional limitations which are conceived to limit the legislative powers of the English Parliament. They relate almost wholly to matters of procedure. The Englishman, in other words, is willing to leave to the legislature, in which the will of the whole public finds expression, the determination of what the substance of the law

English  
Charters of  
Liberty

Procedural  
matters

<sup>1</sup>See, W. B. Swancy, *Safeguards of Liberty* (1920).



*Ultra vires*  
acts

shall be, and what authority shall be exercised by the other agents of government. He insists only that the law shall be administered, and that all official action shall be taken according to forms of procedure that furnish a reasonable guarantee that, as between the individual and the government, the arbitrary element shall be excluded and *ultra vires* or otherwise illegal acts prevented. He expects that, as between the individuals themselves, their private rights shall be determined in courts of law presided over by politically independent and upright judges, according to established laws and in accordance with a procedure that will give to everyone an adequate opportunity to be heard and to present what evidence or argument he may have to show why his contention as to his legal rights should be accepted as correct and controlling.

Substantive  
Rights

This leaves it still legally possible, and, according to English constitutional doctrines, morally justifiable, for the Parliament by law to provide that, in behalf of the public good, the substantive rights of life, liberty, and property of the individual shall be taken from him, provided only, as has been said, that a proper procedure for the taking is supplied. This confidence the Englishmen have in the wisdom and justice of the legislature because its dominant branch, the House of Commons, is freely elected by their own votes and because they know that in the political consciousness of the people there are traditions of right which are of controlling force.

Continental  
Constitu-  
tions

In France and Germany<sup>1</sup> and the other States of Europe which live under written Constitutions, the legislatures are also legally omnipotent, since the courts do not have the power to hold statutes invalid, inconsistent though they may be with the provisions of the written instruments of government under which they operate. In some of these constitutions certain rights are specifically guaranteed to

<sup>1</sup>There is a bill of rights in the Constitution of the German Commonwealth, but the protection afforded to the individual is limited by the fact that the rights may be impaired by legislation.



the individual, but inasmuch as there exists no power to prevent their violation under the authority of a legislative act, they do not rest, as regards their legally binding force, upon a ground different from that which guards the unformulated private rights of life, liberty, and property from legislative encroachment. There can be no question, however, that the enumeration of certain guarantees in the written constitutions of these countries does, in fact, exercise a very considerable restraining influence upon the law-making bodies, for these instruments of government have a morally binding force that cannot be lightly disregarded. To so do would be to court popular discontent and, in extreme cases, revolution.

Value of  
guarantees

The principle is firmly established in the United States that an act of the legislature contrary to the provisions of the written Constitution is void and may be refused recognition and enforcement by the courts. That such a doctrine as this finds a place in American constitutional jurisprudence is due to the fact that these instruments of government not only provide the forms of government that shall exist but fix the extent to which it shall be legitimate for the government, through any of its organs, to exercise a control over the private interests of the governed. And thus it is that the Constitutions of the States of the Union, as well as that of the United States itself, are construed as placing a limit upon the powers of the legislative as well as upon those of the other branches of the government. For the same reason, the constitutional requirement of what is known as "due process of law," which in England relates, as we have seen, only to matters of procedure, has come to mean in American Law that there are private rights of life, liberty, and property, the infringement of which cannot be authorized by the legislature, however impeccable may be the process provided.<sup>1</sup>

Due Process  
of Law

<sup>1</sup>In the case of *Hurtado v. California*, 110 U. S. 516 (1883) the United States Supreme Court distinguished as follows between the English and the American

*Marbury*  
*v. Madison*

The declaration that fixed in American jurisprudence the doctrine that a constitutional provision is superior in its force to a legislative enactment was that of the Supreme Court of the United States in the case of *Marbury v. Madison*,<sup>1</sup> decided in 1803.

Eminent  
domain

The rights of life, liberty,<sup>2</sup> and property, thus secured to individuals, are not absolute in the sense that they may not, under any circumstances, or for any reasons, be taken away, or their exercise restrained by the government. To admit such a principle would render all government practically impossible. Thus it is conceded in the United States as in other countries that private property may be taken in the form of taxes, or for public use upon compensation being made, under an exercise of what is known as the right of eminent domain: that the use of property may be subjected to proper police regulations; that public util-

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constitutional doctrines: "The concessions of Magna Charta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land. . . . The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion, represented by the Commons. In this country (United States) written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. . . . It is not every act, legislative in form, that is law. Law (according to the American conception), is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society, and thus excluding as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts of reversing judgments and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation.'"

<sup>1</sup> 1 Cranch 137.

<sup>2</sup> Liberty is construed to mean not merely freedom from physical restraint, except as a punishment for crime, but permission to engage in any occupation or activity not contrary to the public interest. See the definitions of liberty in

ities such as railways, telegraphs, telephones, express companies, gas and water concerns and the like, and indeed, all occupations that can be said to be affected with a direct and important public interest, may be regulated by law as regards the services that they render and the charges that they may make for them. Even when rights are specifically enumerated in written constitutions as exempt from ordinary legislative control, they are not construed as absolute in character. The life of the citizen may be demanded in case of war, the liberty to express or publish one's opinions is limited by the law of libel or slander, and freedom of religious worship cannot be made a cloak for practices which are contrary to current conceptions of morality or which disturb the peace or endanger the life of the State. The harmonizing of these powers of state control with the private rights secured by constitutional provisions regarding due process of law is not an easy task, but to discuss it further would carry us into realms of technical constitutional law.

Private  
rights  
are not  
absolute

It has been pointed out that the purpose of constitutional government is to obtain a form of public rule so organized and so controlled that the governed will be protected against arbitrary and oppressive action upon the part of those in political authority over them. In order that the best possible security may exist that no one person or body of persons will be able to draw into his or their own hands such a dominant power that the limitations which the constitution imposes may be disregarded with impunity, the device has been adopted in all modern civilized States of placing the creation of the law, its interpretation, and application to particular cases and its enforcement in different and more or less independent organs of govern-

Avoidance  
of arbitrary  
action

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Seeley, *Introduction to Political Science*; Lewis, *The Use and Abuse of Political Terms*; Lord Acton, *The History of Freedom and Other Essays*; Wallas, *Human Nature in Politics*, and the quotations in Garner, *Introduction to Political Science*, p. 329.



ment, which are thus able to check or, as it is sometimes said, to balance one another.<sup>1</sup>

Separation  
of Powers  
Theory

It is neither possible nor desirable wholly to dissociate in their exercise the three functions of making, interpreting, and enforcing laws, but in some States, as, for example, the United States, this principle of the separation of powers has been carried about as far as it is possible, and, according to the opinion of not a few political scientists, to a point beyond what is desirable.<sup>2</sup> Efficiency in the operation of the whole governmental machinery has been unduly sacrificed to the desire to obtain security against possible political oppression.

Security  
at expense  
of efficiency

Whether wisely or not, the principle of the separation of powers is an accepted and influential one in American public law.<sup>3</sup> Thus in the Constitution of the state of Massachusetts we find the following statement which is typical:

The Massa-  
chusetts  
Constitution

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.

This so-called "distributing clause" is to be found in the constitutions of practically all of the states of the American Union. It is not found, in so many words, in the

<sup>1</sup>On the separation of powers theory, see Garner, *Introduction to Political Science*, Chap. XIII, and references; Bondy, *Separation of Governmental Powers* (Columbia University Studies, Vol. V); *The Federalist*, No. 47; Mill, *Representative Government*, Chap. V; Montesquieu, *Spirit of the Laws*, Book XI, Chap. 6; Sidgwick, *Elements of Politics*, Chapters XVII, XXIV; Wilson, *Constitutional Government in the United States*.

<sup>2</sup>"This principle of the separation of powers and authorities has proven, however, to be unworkable as a legal principle. The courts have made many exceptions to it . . . . The principle of the separation of authorities, notwithstanding constitutional provisions and judicial decisions and *dicta* on the general subject, must therefore be regarded as existent in our constitutional law only in an attenuated form." Goodnow, *Politics and Administration*, p. 14.

<sup>3</sup>For recent conservative statements see Lurton, "Government of Law or a Government of Men?" *North American Review*, January, 1911, and Green, "Separation of Governmental Powers," *Yale Law Journal*, February, 1920.



National Constitution, but the same result is reached by the provisions that the executive power shall be vested in the President, that the legislative power shall be vested in the Congress, and that the judicial power shall be vested in the Supreme Court and such other tribunals as Congress may from time to time ordain and establish. And thus we find the Supreme Court of the United States, in one of its decisions, laying down the doctrine that "it is believed to be one of the chief merits of the American system of written constitutional law that the powers entrusted to the government, whether State or National, are divided into the three grand departments of government, the executive, the legislative, and the judicial; that the functions appropriated to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of that system requires that the lines which separate and divide these departments shall be broadly and clearly defined."<sup>1</sup>

Theory  
Adhered to  
in U. S.

To preserve the separation of powers and to render government efficient for the protection of civil liberty, the framers of our federal and state constitutions saw that it was necessary not simply to create separate depositaries for the three powers, but to provide means for preventing the control by one department of the other departments. With this end in view, the executive, legislative, and judicial establishments are made as independent as possible of each other. Thus the legislatures are made the sole judges as to the constitutional qualifications of those claiming membership, they have the power of disciplining and expelling members, their members are in general not liable to arrest except for felony, treason, or breach of the peace, and they may not be held responsible in actions of slander or libel for words spoken or printed by them as members. The independence of the courts is secured by tenures of office and official compensation free from legislative con-

Intention  
of "found-  
ing fathers"

<sup>1</sup> Kilbourne v. Thompson, 103 U. S. 188 (1881).

Powers of  
three de-  
partments

trol, and, furthermore, these tribunals, as we have seen, have the great power of declining to recognize all laws or executive acts which they hold to be unconstitutional or otherwise illegal. The executive has, of course, within his own hands the material force of the State, and, within the limits of the discretion placed by law within his hands, may not be held legally responsible in the courts for his acts.<sup>1</sup>

Based upon the constitutional provisions to which reference has been made, the doctrine has been established in the United States that a department of the government may constitutionally exercise any power, whatever its essential nature, which has by the constitution been given it; but that it may not exercise powers not so constitutionally granted which from their essential nature do not fall within its decision of governmental functions—legislative, executive, or judicial, as the case may be—unless such powers are properly incidental to the performance by it of its own appropriate functions.

Theory  
departed  
from in  
practice

When we compare the constitutional system of the United States with those of other countries it is found that the independence of the legislative, executive, and judicial branches of government has been carried much further than it has been in most if not all of these countries. But even in the United States there have sprung up practices and extra-constitutional devices by means of which, without violating the constitutional principle, the legislative and executive branches have been brought into working relations to each other, so that policies formulated in the executive branch may receive sympathetic reception in the legislative branch, and policies adopted by the law-making power may be carried into effect by the executive who exercises his discretionary powers with loyalty and respect for the motives which have led to their adoption.<sup>1</sup>

<sup>1</sup> The paragraph is substantially quoted from Willoughby, *Constitutional Law of the United States*, Vol. II, p. 1262.

The chief agency through which this has been brought about has been organized political parties. The efficiency in this respect of these extra-constitutional and, in a legal sense, extra-governmental agencies, will be considered in the chapter which deals with the necessary part played by political parties under all forms of popular government.<sup>1</sup>

Importance  
of Political  
Parties

It is not possible to state just how close must be the working relation between the executive and legislative branches of government in order that it may function at all; but it may be stated as a general proposition that the closer the relation is the more efficient the government will be. The practical problem, then, which every government has to meet, is to provide as complete a coöperation between the executive and legislature as is compatible with security against possible tyranny. The different ways in which the different States of the world have solved this problem suggest their most distinguishing characteristic.

When it is said that, to ensure efficient operation, there must be established working relations between the different branches of government, reference is had only to those organs which exercise what are called policy-forming functions. The courts, when acting within their proper judicial sphere, are not concerned with matters of policy. Their function is simply to interpret and apply the law as it comes to them from the legislative organs of government. In operation, therefore, the more independent they are of executive and legislative control and influence, the better it is. It is especially between the executive and legislative branches of government that it is essential to efficiency that harmonious and coöperative relations should exist.

Necessity  
of  
coöperation

With reference to the public policies adopted by a State, the important distinction must be made between their formulation and their enactment into law. Under

<sup>1</sup> Ford, *The Rise and Growth of American Politics*; McLaughlin, *The Courts, the Constitution, and Parties*.



Agencies for  
formulating  
policies

all forms of modern constitutional government it is provided that measures before becoming laws must receive the approval of the legislature, which in turn is followed by the approval of the chief executive.<sup>1</sup> But practice varies greatly in different countries as to the agencies by which are formulated the policies which come before the legislature for its approval. Practice also differs greatly as to the generality with which the policies that are accepted by the legislature are stated, and therefore as to the opportunity for discretion to be exercised by the executive organs which are to execute them.

In the United States the policy-forming function is exercised partly through political parties, their several policies finding statement in their platforms or the action of caucuses, partly in the committees and upon the floor of Congress, and partly through the President in the exercise of his individual judgment or as the representative of his political party. In this important respect, then, the result is a division of responsibility and divided counsels. The matter is still more confused by the fact that the President may not represent the same political party that is in control of one or both of the houses of Congress, and that these two houses may be of different political complexions. This is undoubtedly a defect in the American system of government. Characteristic of American practice, also, is the detail in which policies find statement in the statutes as regards both their substance and modes of enforcement, and, consequently, the relatively small discretionary powers that may be exercised by the executive.

Possibilities  
of disunion  
in U. S.

Great Britain, by means of the responsible cabinet system, has brought the working relations between the executive and legislative branches into almost complete harmony with each other, the legislature permitting the executive to

<sup>1</sup> In the United States the refusal of the Chief Executive to approve measures that have been passed by the legislature may be overcome by a two-thirds vote in both houses.



formulate all the important policies, and contenting itself with the right—which is not often exercised—to refuse to accept them, with maintaining a supervision over the manner in which these policies are executed, and with the right to force out of office an executive whose policies or modes of administration it disapproves. Thus with these rights of criticism, supervision, and political control, the Parliament has not hesitated to vest wide powers of discretion and of policy determination in the hands of executive officials who are, at the same time, the leading members of the majority party of its own body.

British  
practice

In France, also, there has been established a close working relation between the executive and the legislature. The cabinet system which secures this result does not work, however, as smoothly in France as it does in England. This, as will be later shown, is due, among other reasons, to the fact that the Parliament has not been willing to give to the executive chiefs and Parliamentary leaders that confidence and authority which they enjoy in England, and to a multiple party system, requiring a coalition as opposed to single party government. The law-making body has sought not only to hold its executive agents to a strict political responsibility for their acts, but dictates to an unnecessary extent the policies to be pursued by the executive.

France

In the German Empire the *Bundesrath* represented the federated rulers of the German states, and, in Prussia, the King represented the dominant organ in the State; and, while the executive could not legislate without the approval of the legislative chambers, the chambers received their policies from the executive. At the same time the chambers were not able to hold the executive politically responsible for their acts. Considerable friction thus developed between the two branches of government, and the system was able to operate only because of the dominating influence of the executive. In Switzerland there is maintained

Germany

**Switzerland**

a very close working relation between the executive and legislative branches of government, but here the dominant feature is the legislature. The executive, indeed, has a status little higher than that of a committee of the Parliament.

**The Judicial function**

In order that a government may be effectively operated it is not necessary, as has already been said, that there should exist between the judiciary and the other branches of government that close working relation which must be maintained between the executive and legislative branches. This is due to the very nature of the judicial function itself, which is not ordinarily a policy-forming one.<sup>1</sup> In its pure form the judicial function is limited to the interpretation and application to individual cases of the policies of the State as they are found embodied in the law of the land; it is exercised by the decision of cases. On the other hand, the legislature makes general regulations by the enactment of laws; it acts from considerations of public policy, while the judiciary is guided by the pleadings and evidence in the cases.

This is the strict theory, but in fact, as has been earlier referred to, the courts do have, in the exercise of their interpretative power, the opportunity to make law itself, and even to defeat the expressed legislative will, unless that will is stated with such precision and explicitness that it cannot be evaded by the interpretative ingenuity of a hostile court. English and American legal history thus abounds with instances in which the legislative will has been defeated by the skilful constructions given by the courts to the words in which it has been expressed.

**Policy-forming functions of American Courts**

In the United States the courts have a peculiar opportunity to exercise a policy-forming function through the power which they have of interpreting and enforcing the often vaguely phrased limitations imposed by the written constitutions, state and national, upon the legislative will.

<sup>1</sup>Garner, *Introduction to Political Science*, Chap. XVII.

Especially has this been true with reference to the restraining forces which they have been able to give to the constitutional requirement that no person shall be deprived of life, liberty, or property without due process of law.

The restraints which the American courts have been able to place upon the legislative will have given rise during recent years to not a little discontent and has been responsible, indeed, for a demand in some quarters that judges may be "recalled,"<sup>1</sup> that is removed from office by a popular vote or other appropriate procedure. The suggestion has also been made that the doctrine of certain decisions with reference to the constitutional powers of the legislature might be overruled if adversely passed upon by a vote of the people.<sup>2</sup> It is also undoubtedly the knowledge that judges have in fact, if not in theory, law-making and policy-controlling functions that has led nearly all of the states of the American Union to substitute an elective for the appointed judiciary with which they at first provided themselves.<sup>3</sup>

The Courts  
and the  
People

Another point at which the judicial branch of the government is necessarily brought into direct contact with the practical working of the executive branch is when the courts are called upon to determine the validity of an administrative act which is contested either by another organ of government or by a private individual whose rights have been threatened or invaded. Thus the courts have to determine not only the extent of the legal authority of executive agents but the question whether that authority has been exercised in a proper form.

Validity of  
administra-  
tive acts

In the United States and in England and her Dominions the rule is accepted that these questions are in all cases to

<sup>1</sup>On the recall of elected officers see *Bulletin No. 26*, prepared for the Massachusetts Constitutional Convention; Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon*.

<sup>2</sup>The recall of judicial decisions was urged by the Progressive Party in the campaign of 1912. See Ransom, *Majority Rule and the Judiciary*.

<sup>3</sup>Holcombe, *State Government in the United States*, Chap. XI.



**Protection  
against  
Executive**

be determined in the ordinary courts of law notwithstanding the fact that this means an extensive control of the executive by the judicial branch of the government. The feeling in these countries is hostile to the existence of a bureaucratic body of public functionaries the legality of whose acts is not subject to review in the same tribunals which pass upon the legality of the acts of private individuals. The people, in other words, look upon their ordinary courts as the protectors of their liberties against possible executive oppression, and they have a confidence that their courts will not misuse the power thus given to them unduly to interfere with the efficient administration of public affairs. This power of control the courts exercise not only by entertaining suits against public officials for pecuniary damages because of illegal acts upon their part, but by the issuance of a variety of writs directed to those officials.

**Methods of  
judicial  
control**

Thus, by *quo warranto*, the right of one to hold the office which he claims is determined; by *mandamus*, he can be compelled to perform an official act imposed by law upon him; by *injunction*, he may be forbidden to commit an act which he is about to perform; by *habeas corpus*, he may be compelled to show by what legal right he has a person in his custody; by *certiorari*, the validity of any of his acts may be brought before a court for judicial examination; and, of course, by criminal proceedings he may be punished for any violations of the penal law for which he may have been responsible. In addition to the foregoing judicial proceedings, some States permit themselves to be sued in matters arising under contracts, express or implied. No State, however, permits itself to be sued for damages arising from the tortious or criminal acts of its agents. In such cases the persons injured thereby must obtain such relief as may be possible by bringing suits for damages against the officials concerned; or, as is occasionally done, by a petition to the legislature that it grant compensation

**Non-su-  
ability of  
the State**



for the injuries that may have been suffered because of illegal acts of public officers.

As contrasted with the English and American systems which have been described, the prevailing European practice is to provide special tribunals, under administrative control, in which may be adjudicated most of the questions involving the legal extent and manner of exercise of administrative powers. In these countries in which special administrative courts exist it is usual to provide also special "courts of conflicts" whose function it is to decide disputes as to the respective jurisdictions of the administrative and ordinary courts.

Administra-  
tive  
Courts

Peculiarly enough, the propriety of these special administrative tribunals has been defended upon the ground that they are demanded by the logic of the principle of "separation of powers," whereas the English and American argument is that this very principle makes it inappropriate that administrative officials should be permitted to have their legal competences and the legality of their acts determined in tribunals which are, to a considerable extent at least, under their own control.

As a matter of expediency, or as a mere logical proposition, it cannot be said that either view is correct. The English and Americans emphasize the danger of official oppression and to the avoidance of that danger are willing to sacrifice a certain amount of administrative efficiency; the French and Germans and other peoples of Europe, on the other hand, attach the greater weight to that autonomy and efficiency which are possible when the administration is not subject to judicial interference and when questions of official authority are passed upon by tribunals technically expert and controlled by considerations of administrative necessity.

*Droit  
administra-  
tif*

It is difficult to balance the relative merits of the two systems, but the better opinion would seem to be that, in France at least, the rights of private individuals have re-

ceived, in fact, as full protection as they have in America, and, at the same time, greater administrative efficiency has been secured.<sup>1</sup>

Checks  
and  
balances

Closely connected with the differentiation and separation of the executive, legislative, and judicial functions of government is the provision in constitutions of what is known as "checks and balances." The aim of these devices is to offset the exercise of power by one organ with that of another so that they will reciprocally prevent each other from acting unwisely or from attempting to disturb that distribution of political authority which the Constitution provides. This system, then, like that of the separation of powers is dictated by a fear of possible misuse of public authority. Its effect is necessarily to render the machinery of government more complex and expensive and to hinder its free running. These checks and balances are found to some extent in all constitutional governments, but their presence is, perhaps, most conspicuous in the federal and state governments of the United States.

In the  
American  
system

Thus, without attempting to call attention to all those that exist in the Federal government, it may be pointed out that the two Houses of Congress check each other; the President by his veto power is able to check them both; the Supreme Court, by its power to hold void such acts as it deems unconstitutional, is able to restrain all the other organs of government. The President is Commander-in-Chief of the Army and Navy, but Congress must determine the number of troops and ships of war, and supply the necessary funds. The President has all treaty-making and appointing powers but in both cases needs the approval of the Senate, and if a treaty calls for the expenditure of money, the House must give its consent. The House of

<sup>1</sup> The classic discussion of administrative courts is Professor Dicey's chapter on "Rule of Law compared with *Droit Administratif*," *The Law of the Constitution*. There are some interesting qualifications of this discussion (1885) in the introduction to the eighth edition (1915), p. xliii. For further references see below, Chapter XXI.

Representatives presents impeachments of civil officers but the Senate acts as the trial court. The Congress fixes the salaries of the federal judges and of the President and Vice-President but these, once fixed, cannot be changed so as to affect any one in office at the time the change is made. The courts have the power neither of the sword nor of the purse, but they have a life tenure of office.<sup>1</sup>

#### TOPICS FOR FURTHER INVESTIGATION

The American Conception of a Constitution.—Bryce, *The American Commonwealth*; Merriam, *American Political Theories*; Willoughby, *The American Constitutional System*.

The Conventions of the Constitution.—Dicey, *The Law of the Constitution*; Bryce, *The American Commonwealth*; Lowell, *The Government of England*.

Constitutional *Lacunæ* in France.—Sait, *Government and Politics of France*; Lowell, *Governments and Parties in Continental Europe*; Ogg, *The Governments of Europe*.

Charters of English Liberty.—Dicey, *The Law of the Constitution*; Lowell, *The Government of England*; Swaney, *Safeguards of Liberty*; Marriott, *English Political Institutions*.

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<sup>1</sup> See John Adams' well-known criticism of the theory of checks and balances, *Defence of the Constitutions of the United States*, p. 467, (Works, Vol. VI).

## CHAPTER V

### THE WRITTEN CONSTITUTION

Value of  
unwritten  
limitations

FROM what has been said with regard to constitutional limitations upon governmental action it may be seen that these limitations can be effectively operated even when there is no written constitution,<sup>1</sup> or where there is one and the legislature is deemed competent to determine for itself the powers which it may exercise under it. In legal theory under such conditions, the law-making branch is omnipotent, and the courts may not interpose a constitutional veto on any laws that it may enact; in reality, however, the moral respect held for the Constitution or for established principles may be as practically effective as are the formulated constitutional provisions in the United States. Not only this but, as recent commentators upon the English government have pointed out, there has become pretty well fixed in England the doctrine that the Parliament should not, by legislation, make any important change in the constitutional law of the country until there has been a general election to Parliament at which the merits of the proposed change can be discussed and decided upon by the people.<sup>2</sup>

<sup>1</sup>On the development of the idea of a written constitution see McIlwain, *The High Court of Parliament and Its Supremacy*, p. 92.

<sup>2</sup>In fact, however, this reference to the people is not always a satisfactory one for the reason that there are other issues involved in practically every general election, so that it cannot be certainly known just what was the voice of the people with regard to the constitutional question. This had led to the demand in some quarters that provision should be made for a direct referendal rule by the people in important legislative proposals. In itself this demand would seem to be a proper one, but its advisability is rendered less certain when it is considered that the ultimate effect might be seriously to disturb the present working of the system of cabinet government and political responsibility in Parliament. See Dicey, *The Law of the Constitution*, p. xci. (Unless otherwise noted references are to the 1915 edition).



It is thus seen that the description of the difference between written and unwritten constitutions as one between rigid and flexible constitutions is not an accurate one.<sup>1</sup> For in countries like France, Germany, and Switzerland a legislative act is as adequate to work a substantial, if not a formal, change in the written constitution as it is in England to alter the unwritten constitution. And, even if we here regard formal constitutional changes, an inspection of the amending clauses of many written constitutions shows that the difference in procedure between ordinary statutory acts and formal constitutional amendments is so slight as to be almost negligible,<sup>2</sup> or, at least, the added difficulties with regard to the latter cannot interpose any greater obstacles than are raised by such established precedents and conventions as are found in England.

Methods of  
constitu-  
tional  
amendment

In France, formal constitutional amendments are effected by the two houses of parliament voting that a given amendment is desirable and then, at a joint meeting, ratifying this decision by a simple majority vote. In Prussia the only distinction between the enactment of an ordinary law and the adoption of a constitutional amendment was that there must be two approving votes by the legislative chambers, separated by an interval of at least twenty-one days between the two votes. In the German Empire the conditions for a formal constitutional amendment differed from those for ordinary legislation only by the fact that fourteen adverse votes in the *Bundesrath* were sufficient to defeat a proposal. The Constitution of Italy is the *Statuto* issued by Charles Albert in 1848, as King of Sardinia. It contains no provision for its amendment, but it is an accepted principle that it may be altered by ordinary legislative enactment, except, possibly, as to a division of the Kingdom into independent parts. It is the opinion

By legisla-  
tive enact-  
ment

<sup>1</sup>Bryce, "Flexible and Rigid Constitutions," *Studies in History and Jurisprudence*, Essay III.

<sup>2</sup>Cf. Gajac, *De la Distinction entre les lois ordinaires et constitutionnelles* (1911); Duguit, *Traité de droit constitutionnel*, Vol. II, p. 513.

of some commentators, however, that, before any constitutional changes are effected, it is necessary to consult the people at a general parliamentary election.<sup>1</sup>

Rigid and  
Flexible  
Constitu-  
tions

Although it is thus not accurate to describe a written constitution as necessarily rigid in character, as contrasted with an unwritten constitution such as England has, it is quite proper to classify written constitutions as rigid or flexible according to the degree of difficulty with which they may be formally amended. The instances which have been given in the preceding paragraphs are of written instruments of government which are easily amendable. The constitutions of Switzerland, the United States, Japan, and Belgium, not to mention others, are of a more rigid type.

Switzerland

The amending provisions of the Swiss Constitution are too elaborate to be specifically set forth. They make a distinction between total and partial revisions, provide for submitting to a referendum vote the question whether a total revision shall be undertaken, provide for the initiation of partial revisions, either by popular or legislative initiative, and, in either case, the amendments, to become effective, must receive the approving vote of a majority of the persons voting in a majority of the cantons.<sup>2</sup> In Japan, constitutional amendments may only be proposed by the Emperor and, for adoption, there must be a two-thirds vote in both houses of the parliament, a quorum of two thirds of the total membership of each house being present.<sup>3</sup> In Belgium, Article 131 of the Constitution provides that "the legislative power has the right to declare that a revision of such constitutional provisions as it shall designate, is in order. After this declaration the two houses are *ipso facto* dissolved. . . . These houses, with the approval of the King, shall then act upon

Japan and  
Belgium

<sup>1</sup>Lowell, *Governments and Parties in Continental Europe*, Vol. 1, p. 151.

<sup>2</sup>See Brooks, *Government and Politics of Switzerland*.

<sup>3</sup>See below, Chap. XX, and appendix.

the points submitted for revision. In this case the houses shall not deliberate unless at least two thirds of the members of each are present, and no amendment shall be adopted unless it is supported by at least two thirds of the votes."<sup>1</sup>

In the United States the formalities for constitutional amendment are perhaps the most difficult of all.<sup>2</sup> It is required that amendments shall be proposed by a two-thirds vote in each house of Congress, or, upon application of the legislatures of two thirds of the states, a national constitutional convention shall be assembled for proposing amendments. When proposed, an amendment, to be ratified, must receive the approving vote of the legislatures or of specially convened constitutional conventions in three fourths of the states, Congress being authorized to determine which of these two modes of ratification shall be followed. In point of fact, all amendments to the Constitution which have been adopted have been proposed by Congress and ratified by the state legislatures. The provisions of the constitutions of the forty-eight states of the American Union vary widely. In general it may be said, however, that recent years have shown a decided tendency to make easier the adoption of constitutional amendments.<sup>3</sup>

The amending clauses may fairly be said to be the most important clauses of any constitution. That which is sought in the adoption of written instruments of government is the means by which legitimate national development may be secured, and at the same time radical and

The United States

Amending clauses very important

<sup>1</sup>Dodd, *Modern Constitutions*, Vol. I, p. 125; Ogg, *The Governments of Europe* (ed. 1913), p. 534. For the method of constitutional amendment in the British Dominions, see A. B. Keith, *Imperial Unity and the Dominions*, Chap. XVII.

<sup>2</sup>Suggestions for a change of the amending clause of the American Constitution are conveniently grouped by Dodd, "Amending the Federal Constitution," *Yale Law Journal*, Vol. XXX, p. 321 (February, 1921) who discusses the issues raised by the Eighteenth and Nineteenth Amendments. Of interest also is Williams, "The Popular Mandate on Constitutional Amendments," *Virginia Law Review*, Vol. VII, p. 280 (January, 1921).

<sup>3</sup>See Dodd, *The Revision and Amendment of State Constitutions*.



revolutionary changes avoided. Thus when this power of legal development is lacking or rendered too difficult (as, for example, in the old Articles of Confederation), revolution is encouraged.<sup>1</sup> Where constitutional amendment is made too easy of accomplishment, the stability and continuity of political life are endangered. Just how severe these restrictions should be is one of the gravest problems that the statesman has to solve, for no fixed rule can be established, the answer in every case depending upon the temperament of the people and other objective political conditions.

Advantages  
of easy  
amendment

In periods of a State's existence, when social and economic conditions are rapidly changing, more facile amendment is demanded than in more quiescent times. There are thus many who recognize the advantage that England has enjoyed in past years in the ease with which she has been able to adapt her government to changing needs, but who now, in the face of democratic ignorance and unrest, see in this feature a grave political danger, and fear that it renders the ship of state, to paraphrase Macaulay's expression, all sail and no keel.<sup>2</sup> The recent amendments of our own federal constitution have called into question Professor Dicey's belief that the American sovereign is "a monarch who slumbers and sleeps," and, within comparatively recent years there has been exhibited a marked tendency on the part of the several commonwealths to restrict still further the competence of their own legislatures, already abridged by the federal instrument, and to embody in their fundamental law, constitutional prohibitions upon legislative matters other than those relating to the organization and distribution of powers in their respective governments. Thus, for example, the constitution of California enumerates more than thirty distinct classes of acts, most

Too many  
limitations

<sup>1</sup>"The great cause of revolution is this, that while nations move onward, Constitutions stand still."—MACAULAY.

<sup>2</sup>Cf. Dicey's criticism, *The Law of the Constitution*, p. xviii ff., and Belloc, *The House of Commons and Monarchy*.



of them not properly embraced within the field of constitutional law, that are removed from possibility of regulation by ordinary statute. This tendency is significant since it indicates a growing distrust by the American people of their own legislatures.

Distrust of  
Legislatures

Upon the continent of Europe, as we have indicated, constitutional prohibitions have not been legally operative because of the lack of judicial tribunals competent to declare null and void legislative acts in contravention thereof. At the same time, however, these written instruments have undoubtedly operated to some extent as a practical restraint, owing to the greater sanctity given to them by being reduced to such formal statement.

According to American, Swiss, French, and Belgian constitutional doctrines, the written constitution is a fundamental instrument adopted by the people in their original sovereign capacity and thus constitutes the source whence are derived all powers of government, executive as well as legislative and judicial.<sup>1</sup> Thus the United States Constitution begins with the statement: "The people of the United States . . . do ordain and establish this Constitution."<sup>2</sup> The Swiss Constitution declares that it is adopted by the Swiss Confederation, and that the people of the twenty-two sovereign Cantons . . . collectively form this Confederation. The French fundamental laws do not contain any express statement of national assembly representing the whole people. The Belgian Constitution declares that it is enacted in the name of the Belgian people, and contains the express provision (Article 25) that "all powers emanate from the people." It may

Doctrine  
of Popular  
Sovereignty

<sup>1</sup> See Borgeaud, *Adoption and Amendment of Constitutions*.

<sup>2</sup> The American doctrine is stated by Chief Justice Marshall in the case of *Marbury v. Madison*, as follows:

"That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . The original and supreme will organizes the government, and assigns to different departments their respective powers."

be added, with reference to the Italian Constitution that though originally only a charter granted by the King of Sardinia it has come to be regarded as a fundamental instrument binding upon the King and guaranteeing to the people rights of representative government.

Constitu-  
tions as ex-  
pressions of  
royal  
will

As contrasted with these constitutions, which have been mentioned, are those instruments of government which, as in Japan, Germany, and Prussia, and other of the German States<sup>1</sup> are frankly viewed as emanating from the royal will and, therefore, as being in substance concessions by the King to the people of certain constitutional rights. Theoretically at least, these constitutions are subject to withdrawal by an exercise of the same will which originally granted them. The significance of this interpretation of the essential nature of the written constitution will be pointed out in the later chapter which will deal with the European conception of constitutional monarchy. It will be sufficient here to call attention to the phraseology of certain of these royally granted constitutions.

Japan

The Japanese Constitution contains no reference to the people as the source of political authority but, upon the contrary, declares that "the Emperor is the head of the Empire, containing in himself the rights of sovereignty, and exercises them according to the provisions of the present constitution," and, as we have already seen, no amendment to this instrument may even be considered unless proposed by the Emperor. Marquis Ito, who is credited with drafting this Constitution, in his *Commentaries* says: "His Imperial Majesty has Himself determined a Constitution, and has made it a fundamental law to be observed both by the Sovereign and by the people."<sup>2</sup>

Germany

The Constitution of the German Empire was described in its preamble as the work of the rulers of the several uniting States. The Prussian Constitution contained no

<sup>1</sup>The pre-war constitutions are of course referred to.

<sup>2</sup>The capitalization is that of the Marquis Ito.

recognition of the inherent or original sovereignty of the people. It contained the express statement that it was an emanation from the royal will, and Prussian commentators are agreed that, in essential nature the Constitution was "octroyed", that is, granted by the King and not created by the people. Indeed, the first written constitution granted to the Prussian people was arbitrarily annulled by the King and another instrument promulgated in its place.

Prussia

As illustrating the German conception of the essential nature of a written constitution, the following may be quoted from Laband, the leading commentator upon the German Imperial Constitution. He says:<sup>1</sup> "There is no will in the State superior to that of the Sovereign, and it is from this will that both the constitution and laws draw their binding force."

In so far as constitutional limitations operate to secure to the governed a right to participate in their own government and serve to provide a government by law rather than by the arbitrary and autocratic will of the executive, it is clear that it is their purpose to safeguard the general welfare and the private rights of the people. This undoubtedly was the end sought when written instruments of government were wrung from the unwilling monarchs of Europe. These instruments provide for a government by

Prevention  
of autocratic  
government

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<sup>1</sup>*Das Staatsrecht des Deutschen Reiches* (2nd ed.), Vol. I, p. 546. Holding a view such as this, it is but logical that Laband should go on to say: "The Constitution is not a mystical power hovering above the State; but, like every other law, it is an act of its will, subject accordingly to the consequences of changes in the latter. A document may, it is true, prescribe that the Constitution may not be altered indirectly (that is to say, by laws affecting its control), that it may be altered only directly, by laws modifying the text itself. But, when such a restriction is not established by positive rule, it cannot be derived by implication from the legal character of the constitution and from the essential difference between the constitution and ordinary laws. The doctrine that individual laws ought always to be in harmony with the constitution, and that they must not be incompatible with it is simply a postulate of legislative practice. It is not a legal maxim. Although it appears desirable that the system of public and private laws established by statute shall not be in contradiction with the text of the constitution, the existence of such a contradiction is possible in fact and admissible in law."



law, but it is evident that no greater rights of self-government were granted in them than their royal creators felt themselves compelled to concede. By these instruments the monarch remains the possessor of large ordinance-making powers and, indeed of all authority not expressly granted to the other organs of government. Furthermore, as we shall see when we come to consider the European conception of constitutional monarchy, practically all publicists declare that the real law-making power still inheres in the executive and not in the representative chambers. It will also be found that not only in some States, as, for example, in Prussia, was the electorate for the members of the lower house of Parliament so constituted as to prevent the expression of the popular will by means of a manhood suffrage but, in practically every case, provision was made of an upper house so constituted as to be under the control of the King or of the aristocratic classes, thus to operate as an effective check upon the lower and popular chamber.

The written constitutions adopted in the United States, France, Switzerland, and Belgium, are instruments which are founded upon the will of the people, but in them, also, we find many provisions the only purpose of which is to place restrictions upon the will of the people—not absolutely to defeat this will, but to render difficult its authentic expression. Thus it is that in these documents (excepting the French Constitution) not only do we find enumerated many private rights of life, liberty, and property which, except by constitutional amendment, are removed from the legislative as well as from the executive control of the governments which the people have themselves established, but we also discover a great variety of constitutional devices provided with a view to rendering difficult the misuse of the ordinary governmental powers by the people's own elected representatives.

In all constitutional systems of government, and even

Methods of  
protecting  
royal  
power

Restrictions  
on will of  
people



in those which do not operate under written constitutions, a distinction is made between ordinary legislative and constituent functions. The latter, as the name indicates, have to do with the creation of those laws which are constitutional in character, either because of their substantive contents, or because embodied in formal instruments of government.

Legislative  
and  
constituent  
functions

Now it is a rather remarkable fact that, although the legislative body may be regarded as the true representative organ of the whole people, there is a general unwillingness to permit it to function as a constitution-creating or constitution-amending body, at least according to its ordinary modes of legislative procedure, or, in some countries, to function at all in this capacity.

In Prussia and in the German Empire, there was but a slight difference between the procedure by which a constitutional amendment was adopted and that for the enactment of an ordinary law. In France it is required that the final vote shall be taken in a joint meeting of the two legislative chambers. In Switzerland amendments may be proposed by the Parliament, but for adoption must be referred to a direct vote of the people. It is, however, especially in the United States that there has been a refusal to recognize the ordinary legislative bodies as qualified to represent the people with regard to constituent matters.

Participation  
of People  
in  
amendment

With regard to these, the theory is widely held that, if possible, some means shall be devised for obtaining a more direct and authentic expression of the public will than is obtainable by ordinary legislative enactment. It is indeed true that amendments to the Federal Constitution may be proposed by Congress and ratified by the states, and many of the state constitutions are amendable by legislative action, provided it be taken under specified conditions which are intended to furnish a guarantee of deliberate and well-considered action. This sometimes requires that, between the initiation of the amendment and its final

adoption, there must be a general election of members of the legislature. Thus, a possible opportunity is given to the people when they cast their votes to take into consideration the merits of the candidates with reference to the pending constitutional change.

Function of  
a Conven-  
tion

But when the adoption of an entirely new instrument of government, or a thorough revision of all the provisions of the old constitution is to be entered upon, it is practically universal for provision to be made for the assembling of a specially elected body of representatives of the people in what is known as a Constitutional Convention. It will be remembered that the Federal Constitution itself was drafted by a special constitutional assembly and was submitted for adoption, not to the then existing state legislatures, but to special conventions. Whether or not, by this process, the American people acted as one national unit or as thirteen severally sovereign bodies-politic is still disputed. But there has been no dispute that in this way a more solemn and authentic expression of the people's will was obtained than the state legislatures could have given. Thus, for example, we find Chief Justice Marshall, in the famous opinion which he rendered in the case of *McCulloch v. Maryland*<sup>1</sup> declaring that: "to the formulation of a league such as was the Confederacy (under the Articles of Confederation) the state sovereignties were clearly competent." But when "in order to form a more perfect union it was deemed necessary to change this alliance into an effective government possessing great and sovereign powers and acting directly upon the people, the necessity of referring it to the people and of deriving its powers directly from them was felt and acknowledged by all."

Its superior  
authority

In a number of the states of the American Union the theory is held that, when a constitutional convention is in existence, it is, as it were, the veritable incarnation of the

<sup>1</sup>4 Wheaton 316 (1819).

sovereign people, even though it may have been convened only for the purpose of drafting a constitution which, for adoption, would have to be submitted to the vote of the people. The belief is held that the inherent and original sovereignty of the people is so clearly made manifest that the Convention is, for the time being, superior in authority to any laws or constitutions that may be in force. It may therefore exceed the authority granted to it by the constitutional laws or statutes which brought it into being, and it may promulgate as well as draft a new constitution; it may even exercise the ordinary functions of government, enacting laws, dispensing justice, levying taxes, and authorizing the expenditure of public moneys.<sup>1</sup>

Such a theory is practically the one upon which the representatives of the *Tiers État* of 1789 acted in France. It is clear that it contains a mystical element for, regarding the Convention, not as a representative body, but as the veritable body-politic incarnate in itself, it is a political dogma of transubstantiation.

#### TOPICS FOR FURTHER INVESTIGATION

Methods of Constitutional Amendment.—Bryce, *Studies in History and Jurisprudence*; Ogg, *The Governments of Europe*; Dodd, *Modern Constitutions*; Dicey, *The Law of the Constitution*; Bryce, *Modern Democracies*; Willoughby, *The Government of Modern States*.

The Powers of Constitutional Conventions.—Dodd, *The Revision and Amendment of State Constitutions*; Borgeaud, *Adoption and Amendment of Constitutions*; Holcombe, *State Government in the United States*; Hoar, *Constitutional Conventions*; Jameson, *The Constitutional Convention*.

The Recent Amendments to the American Constitution.—Dodd, "Amending the Federal Constitution," *Yale Law Journal*, Vol. XXX, p. 321, and references; Thompson, "The Amendment of the Federal Constitution," *Proceedings of the*

<sup>1</sup>For an account of the different theories with regard to the nature and powers of the constitutional convention, see Jameson, *The Constitutional Convention* and Hoar *Constitutional Conventions*.

*American Academy of Political and Social Science*, Vol. III, p. 17 (January, 1913); Munroe Smith, "Shall We Make Our Constitution Flexible?" *North American Review*, Vol. CXCIV, p. 657 (November, 1911); Burgess, *Political Science and Comparative Constitutional Law*.



## CHAPTER VI

### THE SUSPENSION OF CONSTITUTIONAL GUARANTEES

IN ALL constitutional systems it is recognized that provision must be made for those exceptional circumstances under which, as a matter of imperative necessity, certain of the ordinary constitutional guarantees in favor of civil liberty must be suspended. The admission of such a principle as this in a constitution is, of course, a dangerous matter and, when applied, means a reversion, to an extent at least, to autocratic government. Not only is the door thus opened to oppression of the individual, but the possibility is ever present that those in authority, once vested with autocratic powers, will not be willing to surrender them when the occasion for their use is past. It is, therefore, highly important that care should be taken to define as clearly as possible the circumstances that shall be deemed to warrant, and the government officials by whom shall be declared, a suspension of any or all of these constitutional guarantees of civil liberty which operate under normal conditions.

Ordinarily it is provided that there shall not be a suspension of constitutional guarantees except in time of foreign war or domestic insurrection; and, under republican forms of government, it lies with the representatives of the people, that is, the legislature, to determine that a state of foreign war exists, or that domestic disorder has become so serious as to warrant the disregard of the usual constitutional modes of government. In the countries of Europe this abnormal condition, when, for the time being, the usual methods of constitutional government become

**Emergency  
powers  
sometimes  
necessary**

**Constitu-  
tional  
guarantees  
suspended**

inadequate or inappropriate, is known as a "state of siege." By this phrase it is not meant that the country is actually besieged by an enemy, but that the public danger is so great that military rather than civil methods of government must be employed.

In times of peace the military forces of a nation are as fully subject to control by the civil law as are the other branches of the public service. The officers and men of the army and navy have, by enlistment, assumed special obligations and have placed themselves under the operation of a special set of laws known as military law. These laws define their military duties, and an infringement of them may be punished in a summary manner by court-martial, followed by fine, imprisonment, or even death. But by being thus subjected to this special jurisdiction and special laws, the members of the military services are in no sense removed from the jurisdiction of the ordinary courts, civil and criminal, and the army and navy as a whole are under the control of the constitution and the laws passed in pursuance thereof.

It not infrequently happens, however, that the civil authorities are confronted with a disorder so serious that, although it does not amount to a civil war, the ordinary constabulary or police forces are not able to preserve order and enforce the law, and that, therefore, the aid of portions of the military establishment is required. When this is the case these military bodies, thus called upon, are employed as agents of, and in subordination to, the civil authorities.<sup>1</sup>

When, however, in the European States, a "state of siege" is declared, the practical effect is to place the military arm of the government in the ascendancy.<sup>2</sup> The civil

<sup>1</sup> As, for example, in the Colorado strike (1914), the Paint Creek Coal Fields (1912-13), and the Mingo trouble in 1921.

<sup>2</sup> It vests "in the hands of the military authorities all the powers which are usually exercised by the civil authorities, and all crimes, felonies, and misdemeanors can be tried before the 'Conseils de Guerre,' or military tribunals, who-

authorities are not overthrown, but their operations are at any time and in any respect subject to be displaced by military methods, and the ordinary provisions of the civil law superseded for the time being by military orders. Thus the effect is not to suspend throughout the country all the constitutional guarantees which protect the individual against arbitrary public authority, but to make it possible for these guarantees to be disregarded at any time in any instance at the discretion of the military authorities.<sup>1</sup>

It has been the proud boast of the English Constitution that, as opposed to such a régime, it has ensured the Rule of Law. This has meant, in the words of Professor Dicey, its most authoritative expounder, "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power." Prerogative and wide discretionary authority on the part of the government are not possible. "Englishmen are ruled by the law and by the law alone; a

The Rule  
of Law

ever may be the persons accused thereof." Maurice Thery and Richard King, "Emergency Legislation of France," *The Solicitors' Journal*, Vol. LIX, p. 203 (Jan. 16, 1915). As President Lowell has expressed it, the state of siege "can be made by statute, or, if Parliament is not in session, it can be made by the President: but in that case, in order to meet the danger of a *coup d'état*, which is ever present to the eyes of Frenchmen, it is provided that the Chambers shall meet as of right in two days. Within the district covered by the state of siege, the military courts can be given criminal jurisdiction, and can punish any offences against the safety of the republic or the general peace. They can search houses by day or night, expel from the district any non-residents, seize all arms and forbid any publications or meetings which are liable to disturb the public order." Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 63.

<sup>1</sup>The situation in Germany was well described by Ambassador Gerard:

"With the declaration of war the ultimate power in Germany was transferred from the civil to the military authorities.

"At five o'clock on the afternoon of Friday, and immediately after the declaration of a State of War, the Guard of the Grenadier Regiment Kaiser Alexander, under command of a Lieutenant with four drummers, took its place before the monument of Frederick the Great in the middle of the Unter den Linden. The drummers sounded a ruffle on their drums and the Lieutenant read an order beginning with the words 'By all highest order: A State of War is proclaimed in Berlin and in the Province of Brandenburg.' This order was signed by General von Kessel as Over-Commander of the Mark of Brandenburg; and stated that the complete power was transferred to him; that the civil officials might remain in office, but must obey the orders and regulations of the Over-Commander; that house-searching and arrests by officials thereto empowered could take place at any time; that strangers who could not show good reason for remaining

man may be punished for a breach of law, but he can be punished for nothing else."<sup>1</sup>

Foreign observers like de Lolme, de Tocqueville, and Gneist discussed this feature of the English Constitution with astonishment and admiration for there was nothing similar to it in their own legal systems. Continental jurisprudence, as has been said, allows the executive the weapon of the "state of siege": the civil authority to preserve order is taken over by the army; military tribunals try offenders against the public order and peace; homes can be searched by day or night; arms can be taken from citizens, and publications or meetings can be prevented if of such a nature as to excite disorder—the degree of probability being passed upon by the military authorities. The English Defence of the Realm Regulations, as will appear later, struck a rather vicious blow at the Rule of Law, but the time was abnormal. *Inter arma silent leges.* D.O.R.A. remained in effect for months after the conclusion of

Rule of Law  
struck at

in Berlin, had twenty-four hours in which to leave; that the sale of weapons, powder and explosives to civilians was forbidden; and that civilians were forbidden to carry weapons without permission of the proper authorities.

"The same transfer of authority took place in each army corps. . . . These army corps commanders were not at all bashful about the use of the power thus transferred to them. Some of them even prescribed the length of the dresses to be worn by the women; and many of the women having followed the German sport custom of wearing knickerbockers in the winter sports resorts of Garmisch-Partenkirchen, the Generalkommando, or Headquarters for Bavaria issued in January, 1917, the following order: 'The appearance of many women in Garmisch-Partenkirchen has excited lively anger and indignation in the population there. This bitterness is directed particularly against certain women, frequently of ripe age, who do not engage in sports, but nevertheless show themselves continually clad in knickerbockers. It has happened that women so dressed have visited churches during services. Such behavior is a cruelty to the earnest minds of the mountain population and, in consequence there are often many disagreeable occurrences in the streets. Officials, priests and private citizens have turned to the Generalkommando with the request for help; and the Generalkommando has therefore empowered the district officials in Garmisch-Partenkirchen to take energetic measures against this misconduct; if necessary with the aid of the police' . . . .

"These corps commanders are apparently responsible direct to the Emperor; and therefore much of the difficulty that I had concerning the treatment of prisoners was due to this system, as each corps commander considered himself supreme in his own district not only over the civil and military population but over the prison camps within his jurisdiction." Gerard, *My Four Years in Germany*, p. 403 ff.

<sup>1</sup>Dicey, *Law of the Constitution*, Part II.



peace—in October, 1920, a member of Parliament was charged with seditious utterances under it.<sup>1</sup> With no great hubbub, however, and with the Irish imbroglio and the coal strike of 1920 furnishing an effective although doubtless not an anticipated smoke screen, the English Government gave up the Rule of Law and resorted to the first Coercion Bill since the days of Castlereagh. Like France, England may now have a “state of siege.” The anticipated emergency was the use of “direct action” by labor.

The measure, which went through Parliament very quickly the latter part of October, 1920, is entitled “The Emergency Powers Act, 1920.” It looked, however, only to an emergency in the future and the Government told the Commons that it had been in contemplation for several months, entirely apart from the coal strike or other industrial incident. The moment of its introduction—after the threat of the railroad strike—was characteristic of Mr. Lloyd George’s opportunist genius; and it was an evidence of his remarkable hold on the House of Commons as well as of the revolutionary character of the statute, that the Prime Minister’s dramatic intervention in the debate—not a frequent occurrence—was necessary to secure the acceptance of the proposal. The Act is so important that its first section may be set forth in full:

Emergency  
Powers  
Act

If at any time it appears to His Majesty that any action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, light, or other necessities or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, His Majesty may, by proclamation (hereinafter referred to as a proclamation of emergency) declare that a state of emergency exists.

This, as will be seen from the two italicised clauses, gives the executive very wide discretion as to the urgency

<sup>1</sup>The Defence of the Realm Act was to last until the Turkish Treaty went into effect.

of the extraordinary action which the bill empowers. When the proclamation is made, His Majesty may, by Orders in Council, issue "regulations for securing the essentials of life to the community." Government departments (including the War Department) may be given "such powers and duties as His Majesty may deem necessary for the preservation of the peace," for securing supplies of necessary commodities, for maintaining the means of locomotion, and His Majesty may act, by Order in Council, "for any other purposes essential to the public safety and the life of the community." The measure does provide that if Parliament is not in session when the proclamation is issued, it must be summoned within a week. The Government originally proposed a fortnight, but consented to this amendment. (When the "state of siege" is inaugurated, the French Chamber must be convoked within two days.) Regulations remain in force for only one week (originally two weeks) unless both Houses of Parliament approve by a resolution. Persons are to be tried by "courts of summary jurisdiction" but the maximum penalties are imprisonment for three months or a fine of one hundred pounds or both. The important thing, however, is not the character of the punishment but the method of coercion.

The amendments which Parliament was able to force the Government to accept were not even a barren victory for the Rule of Law. Compulsory military service or industrial conscription cannot be imposed; strikes are not unlawful *per se*, and "peaceful persuasion" during them is not barred. The Labor Party proposed an additional clause which would permit the Government to deal with an emergency caused by "financial operation or the exercise of monopoly or the artificial raising of prices, or the withholding of supplies, which would deprive the community of the essentials of life," but this was beaten. The Lords amended the bill so that the regulations cannot

Its  
provisions

Amended  
by the  
Lords

alter existing procedure in criminal cases or confer any right to punish by fine and imprisonment without trial.

In spite of these amendments, the bill deals the Rule of Law a death blow. It was pointed out in the debate that the powers conferred go far beyond the necessities of life and that the statute is reminiscent of the decree of the Roman Senate authorizing the Consuls "to see that the Republic took no harm." Under the law the Government can suspend legal redress against the police and military authorities and suppress inquests, as was done in Ireland under special statutes.<sup>1</sup> In the event of a coal strike, Labor leaders can be tried before courts of summary jurisdiction and imprisoned—without any violation of the law of the land—and the miners will be without leaders. *The Manchester Guardian*, or any other newspaper, can be suppressed on account of an article favoring a strike. If the phrase "essentials of life" is not sufficiently broad, "preservation of the peace" can cover any executive action.<sup>2</sup> The possession of power to be sure, is less important than the manner of its exercise; and it may be admitted that if the coal miners struck, let us say, to force the nationalization of the mines, the leaders would hardly be interfered with by the Government whose course, in all probability, would be to provide "necessities" rather than to attempt arbitrarily to break the strike.<sup>3</sup> The law is, for

Possible  
forms of  
coercion

<sup>1</sup>For an interesting discussion of the legality of procedure under these statutes, see "What is Martial Law?" *The Nation* (London), February 12, 1921.

<sup>2</sup>It may be said again, however, that these powers rest on law, being delegations from the supreme legislative power. Hence, in a sense, the Rule of Law is not broken, though it is used to defeat itself, so to speak. See on this point, Stubbs, *Constitutional History of England*, Vol. II, p. 589, in discussing the famous Statute of Proclamations.

<sup>3</sup>The measures actually taken in England are partly described in the following statement from the *London Times* (weekly ed.), April 15, 1921:

"A GREAT EMERGENCY"

Five Royal Proclamations consequent upon the Government's decision to call up the Reserves were published in a supplement to the *London Gazette*. They provided for:—(1) Calling out Class B of the ROYAL FLEET RESERVE.

(2) Calling out the ARMY RESERVE.

(3) Continuing soldiers in ARMY service.



the most part, a threatening gesture, a piece of legislative intimidation; but with it on the statute books, Professor Dicey will have to rewrite *The Law of the Constitution*.<sup>1</sup>

## Martial Law

In American constitutional jurisprudence, there is no "state of siege," but, by what is known as a declaration of "martial law," a condition is brought about which is, in some respects, similar, but yet distinguished from the European expedient. The expression "declaration of martial law" is an unfortunate and misleading one, for, in fact, there is not known to the English or American law any special body of martial law which, not ordinarily oper-

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(4) Calling out the AIR FORCE RESERVE.

(5) Continuing airmen in AIR FORCE service.

The first Proclamation set out that "owing to the state of public affairs and the demands upon our Naval Forces for the protection of the Empire" an occasion has arisen for ordering and directing that Volunteers under the Naval Reserve Act, 1900, who belong to Class B of the Royal Fleet Reserve, shall be called into actual service, and they are accordingly so called.

The other Proclamations set out, in identical terms, that—

The present state of public affairs and the threatened dislocation of the life of the community occasioned by the existing strike in the coal mines and its threatened extension to the railway and transport services of the country have, in our opinion, constituted a state of great emergency within the meaning of the said Act.

The Army Reserve and the Air Force Reserve were accordingly "called out on permanent service," and all soldiers and airmen who would otherwise be entitled to be transferred to their respect Reserves were ordered to continue in Army or Air Force Service until legally discharged or transferred to those Reserves.

As announced by the Prime Minister in Parliament the constitution of the emergency units, to be called "Defence Units," for service in England, Scotland, and Wales was proclaimed.

An appeal was addressed to Loyal Citizens, including those serving in the Territorial Force, except those:—

(a) Belonging to any other branch of his Majesty's Service.

(b) Employed on Government Service.

(c) Serving with the Police Forces,

who are capable of bearing arms and between the ages of 18 and 40 (except officers), to report to the nearest Territorial Drill Hall for the purpose of being commissioned or attested for temporary military service, not exceeding 90 days, with the Regular Army in new units to be created called "Defence Units" for service in England, Scotland, and Wales only.

The War Office authorities deprecated any suggestions that troops were to be used for strike-breaking purposes. Their function is to aid the civil power, when and where necessity may arise, in the preservation of the public peace and in the maintenance of essential services.

<sup>1</sup>With regard to the measure it may be pointed out that economic society is now so highly integrated and the public is so much at the mercy of well-organized, strategically placed minorities, that the Government—at present the only possible mediating agency—must be able to act quickly in a crisis. The American



ative, can be brought into execution by an official declaration. All that is really meant when the expression "declaration of martial law" is used, is that the military forces, or a part of them, have been called upon by the civil authorities to aid them in the maintenance of order and the enforcement of law. But no new laws have been brought into operation, no civil authorities are superseded, and no constitutional rights are thereby suspended or subject to suspension.

The military authorities are subject to the orders of the civil authorities, and not *vice versa*; and for all acts done in pursuance of military orders there is the same responsibility, civil and criminal, that there is for any other acts. Misapprehension on this point has been due to the fact that the military is not used by the ordinary civil authorities except in times of very considerable disorder and danger to life and property. Then repressive and preventive measures are legally justified, whether committed by the ordinary police officers or by the military acting in their place, which would not be legally justified if the public tumult were not so great and the danger to life and property not so imminent and wide-spread.

Civil  
authorities  
in control

In both American and English law the necessary and

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Constitution makes the Federal Government one of delegated authority. President Cleveland showed that this was sufficient in the case of interstate commerce [see Cleveland, *The Railroad Strike of 1894*; *In Re Debs*, 158 U. S. 564 (1895)] but the Wilson administration was unable to cope adequately with the bituminous coal strike of 1919 and it seems likely that the President and Congress would be constitutionally impotent in the face of several possible industrial crises.

It is proper to question whether the English Government, in order to meet a threat of direct action, should threaten, even strike down the Constitution. The Petition of Right, the Long Parliament, and the abolition of extra-ordinary courts like the Star Chamber saved personal and political liberty in England. During the war all democracies were forced to borrow the methods of their autocratic adversaries and in this case it was probably necessary to use fire to fight fire. One is justified in doubting, however, whether this forestial axiom has political validity in time of peace. The Stuart theory of government is obnoxious whether it results from the autocratic pretensions of an executive or from the anarchic use of economic power for political purposes. And it may be argued with considerable force that public opinion rather than coercion is the proper answer to direct action; that a government successfully to deal with an attack on the Constitution should go forth with the Rule of Law as their principle and the Constitution as their instrument.

Legal and  
illegal acts

just principle is adopted that a public officer charged with the preservation of the peace and the protection of life and property against illegal assaults may make use of as much force, including even the taking of life, as is reasonably necessary for preventing the commission of crime. It therefore follows that if the public disorder is great and the corresponding danger to life and property proportionately acute, repressive and preventive acts are permitted which, under ordinary circumstances, would be themselves illegal. But, under any circumstances, only as much force may be employed as may be reasonably necessary to uphold the law. Whether martial law be declared or not, the rule holds good that a military man, as well as a police officer must, if necessary, be able to justify his acts in a court of law, upon the ground that there was a reasonable necessity for them, or that, at least, he had reasonable grounds for believing them to have been necessary.

This point has been here emphasized, even though it has carried us into a somewhat difficult field of constitutional law, for it is really of the essence of the American and English conception of constitutional government that the military forces of the State, equally with the other branches of the public service, should be subject to the control of the civil law.<sup>1</sup>

Defence  
of the  
Realm  
Act

Very soon after the outbreak of the Great War in August 1914, the English Parliament passed the Defence of the Realm Act which, together with other acts, had a legal effect not very different from the establishment of a continental "state of siege." This was the case because, by this legislation, very broad powers were given to the Crown and the military authorities to take such action and to issue such prohibitions or mandatory orders as they might

<sup>1</sup>On the nature of martial law see Dicey, *Law of the Constitution*, Chap. VIII, and appendix, Note X; Willoughby, *Constitutional Law of the United States*, Vol. II, p. 1228; Ballantine, "Qualified Martial Law," *Michigan Law Review*, Vol. XIV, pp. 102, 197; *Ex parte Jones*, 71 W. Va. 576 (1913); several articles in the *Law Quarterly Review*, Vol. XVIII, and Glenn, *The Army and the Law*.

think the great crisis demanded, and to punish, by military methods, violations of the orders thus issued. It is, however, to be observed that even in this instance the military powers thus authorized rested upon acts of Parliament for their existence and delimitation and, of course, were subject at any time to modification or withdrawal by the authority which issued them.<sup>1</sup>

The most important protection which the individual has against possible oppression by those in political authority over him is the right to obtain from the courts a writ compelling anyone who is restraining his liberty to show by what legal right this is done, and to release him from custody if no such legal right is shown. This judicial order is known in American and English law as the writ of *habeas corpus*, from the first two words employed by it in its Latin form. The writ is issuable by any court of general jurisdiction and may be obtained either by the person who is in custody or by someone else in his behalf.

Writ of  
*Habeas*  
*Corpus*

The United States Constitution specifically provides that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." At the time of the Civil War the President claimed the constitutional right to determine when the occasion warranted the suspension

The  
American  
Civil War

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<sup>1</sup>But, to quote a writer in the *Law Magazine and Review* (February, 1915), "at the present moment the Common Law lies under the iron heel of militarism, a militarism of the same genus which we are endeavoring to destroy on the plains of Flanders. Once let militarism gain the upper hand in her conflict with the Common Law, war or no war, it will tend to grow to the same evil proportions it has attained in Germany." Public opinion forced some modification of the Defence of the Realm Regulations. See Rogers, "The War and the English Constitution," *The Forum*, July, 1915; Baty and Morgan, *War: Its Conduct and Legal Results*; Pulling (ed), *Manual of Emergency Legislation*.

It may be noted that when D. O. R. A. was proposed the House of Lords was more reluctant than the Commons to sanction it. Lord Bryce declared that the bill was without precedent; that the British subject was entitled to be "tried by a civil court when there is a civil court to try him." Lord Halsbury called the procedure the "most unconstitutional thing that has ever happened in this country." And it was due largely to the objections voiced by the peers that the bill was amended to allow British subjects a jury trial. Perhaps England could do worse than to keep her House of Lords.



of the writ.<sup>1</sup> It is now, however, pretty well agreed that the suspension must be authorized by Congress.<sup>2</sup>

Effects of  
suspension

When the writ is suspended there is not thus given to any public official an authority to make arrests or to keep persons in custody which he would not have if there were no suspension. Nor are the courts thereby prevented from issuing the writ. The only effect of the suspension is that, for the time being, one who has the custody of a person cannot be compelled to obey the writ and thus to show in an ordinary civil court that he is acting with full legal right. If then, after the privilege of the writ has been restored, it is shown that the arrest or the imprisonment was without legal justification, the persons ordering or participating therein can be held civilly and criminally responsible.

Ex parte  
Milligan

Legislation, comparable to the Defence of the Realm Regulations which practically placed England under martial law is impossible in the United States, by reason of the constitutional provision just stated. The point was decided by the Supreme Court when it was called upon to determine the authority of a military commission which, during the Civil War, had imposed the death sentence upon one Milligan, who was not a prisoner of war, or in the military or naval service, and who was a resident of a state where no military operations were being carried on. The Court said that persons could not be tried by military commissions in localities away from the theater of hostilities when the civil courts were open for the transaction of business. In other words, in order to meet the constitutional requirement that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it," actual and not simply constructive necessity by a declaration

<sup>1</sup>J. F. Rhodes, *History of the United States*, Vol. IV, p. 169 ff; Dunning, *Essays on the Civil War and Reconstruction*.

<sup>2</sup>Willoughby, *Constitutional Law of the United States*, Vol. II, p. 1253.



of the legislature is necessary; and the courts will be the judge. The opinion quite flatly states: "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."<sup>1</sup> It is conceivable that an unimpeded judiciary might not always be a wholly adequate test, but it furnishes a powerful presumption that the necessity does not exist. Such, at all events, is the doctrine of American constitutional law.<sup>2</sup>

When  
martial  
law is  
justified

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

So spoke the United States Supreme Court,<sup>3</sup> but in time of war such a proud doctrine sometimes gives way to the maxim, *Salus populi suprema est lex*.

#### TOPICS FOR FURTHER INVESTIGATION

Martial Law and the English Constitution.—Dicey, *The Law of the Constitution* (appendix); Bowman, "Martial Law and the English Constitution," *Michigan Law Review*, Vol. XV, p. 93 (December, 1916), and references above, pp. 102, 103.

<sup>1</sup> *Ex parte Milligan*, 4 Wall, 2 (1866); Thayer, *Cases on Constitutional Law*, Part IV, p. 2390.

<sup>2</sup> This test seems to have been abandoned in English law since *Ex parte Mairais* (1902), A. C. 109. For an able discussion which supports the American doctrine, see T. Baty and J. H. Morgan, *War: Its Conduct and Legal Results*, pp. 6, 17 ff (1915). See also Charles E. Hughes, "War Powers under the Constitution," *Report of the American Bar Association*, 1917.

<sup>3</sup> *Ex parte Milligan*. For an argument that in time of war the government can set aside the Bill of Rights, see Fletcher, "The Civilian and the War Power," *Minnesota Law Review*, Vol. II, p. 110. As to freedom of the press in time of peace and time of war, see Corwin, "Freedom of Speech and Press under the First Amendment: A Resumé," *Yale Law Journal*, Vol. XXX, p. 48 (1920), and Chaffee, *Freedom of Speech*.

Martial Law in the United States.—Ballantine, "Military Dictatorship in California and West Virginia," *California Law Review*, Vol. I, p. 413; "Martial Law," *Columbia Law Review*, Vol. XII, p. 529; "Unconstitutional Claims of Military Authority," *Yale Law Journal*, Vol. XXIV, p. 189; and references above, pp. 101, 104, 105.

The Power of Congress to Deal with Strikes.—Willoughby, *Constitutional Law of the United States*; Goodnow, *Social Reform and the Constitution*; Commons and Andrews, *Principles of Labor Legislation*; Orth, *The Relation of Government to Business and Industry*.

The "State of Siege."—See above, pp. 95, 96.

## CHAPTER VII

### POPULAR GOVERNMENT

A GOVERNMENT may be said to be "popular" to the extent that its policies and operations are subject to the control of the wishes of the governed. This popular element may be measured in two ways: first, by the extent to which the whole people participate in their government—that is, through the suffrage and eligibility to public office; and secondly by the actual influence which the will of the governed exerts upon those in authority.

Elements of  
Popular  
Government

Terms that are often used as synonymous with popular government are "democracy" or "democratic government." These terms, derived from the Greek word *demos*, meaning the citizen body of a State, indicate that the mass of the people have their political control in their own hands. The idea is thus very similar to that of popular government, a term which is derived from the Latin *populus*, meaning the people collectively considered. Exactness of thinking is secured, however, if we use the term democratic government as indicating a direct participation of the people in the operation of their own political institutions and distinguish it from representative government, under which they govern themselves through representatives of their own selection. Popular government, then, as above defined, indicates a quality rather than a form of government, namely, its amenability to the control of public opinion, whatever be the organs or instrumentalities through which the control of that opinion is exercised.

Quality  
rather than  
form

"Popular," like the term "Constitutional," will be used in this discussion as indicating the possession by the gov-

Popular  
control  
and civil  
liberties

ernment to which it is applied, of particular features or characteristics, rather than a special form of organization. Though connoting two distinct ideas, the elements of constitutionalism and popular control have, in practice, been closely associated. In an earlier chapter it has been seen that a government which is constitutional is so constructed and operated that civil liberties and due process of law are secured to the individual. At the same time political powers are distributed and the different organs of government balanced against one another so that the disregard of constitutional limitations by those in authority is difficult, if not impossible. In order that there may be an additional guarantee that the interests of the governed may be made known and may control those in authority, provision is almost universally made for a certain amount of participation by the bulk of the adult portions of the citizen bodies in their own central and local governments. This participation by the people in their own government, though it cannot be said to be absolutely essential to the conception of a constitutional government, is almost universally one of its concomitants; and just to the extent to which this popular element is present and controlling in its operation, a government is said to be popular in character.

Popular gov-  
ernment and  
constitu-  
tional gov-  
ernment

Thus it is perhaps proper to say that popular government is a phase of constitutional government; for, while it may be possible to have a constitutional government which is not popular in character, it does not seem possible to have a government permanently popular in character unless it be one obedient to constitutional limitations.<sup>1</sup>

Popular government is, then, a government subject to

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<sup>1</sup>“Popular government may in substance exist under the form of a monarchy, and an autocratic despotism can be set up without destroying the forms of democracy. If we look through the forms to the vital forces behind them; if we fix our attention, not on the procedure, the extent of the franchise, the machinery of elections, and such outward things, but on the essence of the matter, popular government, in one important aspect at least, may be said to consist of the control of political affairs by public opinion.” Lowell, *Public Opinion and Popular Government*, p. 4.



the influence of Public Opinion. This is true not merely in the sense that any government, however autocratic, is to some extent limited by the unwillingness of the people to submit to oppression carried beyond a certain point, but in the sense that definite constitutional agencies exist whereby the "General Will" of the people may be made known regarding political policies, and, when made known, given an appreciable influence in determining the conduct of those in authority.

**Influence of  
Public  
Opinion**

A consideration of the theoretical or abstract grounds upon which is based the demand that the form, activities, and administration of a government should be controlled by the will of the governed takes us back to an examination of the ethical grounds upon which political authority itself may be defended. In the chapter in which this topic was discussed it was shown that a given government and its activities may be ethically defended only in so far as they tend to promote the welfare of the governed and, through them, the welfare of humanity. As a practical proposition then, the political problem in all States is to secure that form of governmental machinery which, taking all the circumstances of time, place, and people into consideration, will best secure this end. As thus stated there are no *a priori* grounds upon which any particular form of government, whether monarchic, aristocratic, or democratic, may be given the preference. Each is to be judged by the results which are or may be expected to be obtained by it. This is sufficient to dispose of those theorists like Rousseau and his followers who, without attempting to show the results which will necessarily be obtained, assert that none but a democratic or representative democratic political régime can be ethically defended.

**Utilitarian  
standards**

If, then, popular government, whether operating under monarchical, representative, or democratic forms is to take its place alongside of other and more autocratic methods of political rule, and, like them, be subjected to

utilitarian estimates, we are led to ask just what are the merits and demerits of popular government, a balancing of which, when compared to the merits and demerits of autocratic rule, give to the former the preference. And, when the answer is given to that question, it will be pertinent to inquire what are the governmental agencies through which this control by the popular will may best be realized.

Benefit of  
governed

The demand for popular government accepts as its fundamental premise the assertion that all governments should exist for the benefit of the governed. It thus, at one blow, sweeps away all defences of autocratic rule based upon claims of hereditary, divine, traditional, contractual, or proprietary right put forth by those in possession of political authority or asserting a title to it.

Proceeding from negation to affirmation, the supporters of popular government must make the following assertions: (1) that the people know what is for their own best good or, at least, that they are able to select representatives who have and can make known this knowledge; (2) that they are willing to make the necessary sacrifices and to yield the necessary obedience in order that this general welfare may be obtained; (3) that, directly or indirectly, they are able to establish and operate a governmental machinery by means of which the result which they desire may be obtained.<sup>1</sup> These premises need to be carefully analyzed.

Other  
premises

It is not an axiomatic or self-demonstrative proposition that a people as a whole knows better than do some of its individual members, or even better than another political

<sup>1</sup>"The fundamental assumption of popular government is that public opinion should be carried into effect, provided, of course, that it is an enduring opinion, not a mere passing whim liable to be soon reversed; and there are two reasons why this should be done. The first is based, not on any supposition that the opinion of the people is always right, but on the belief that it is on the whole more likely to be right than the opinion of any other person or body which can be obtained. The second reason is that contentment and order are more general, and the laws and public officers are better obeyed, when in accord with popular opinion, than otherwise. It is unnecessary to discuss here the validity of these reasons, for we are dealing, not with the theoretical merits, but the methods of operation, of democracy. It is enough for us that these principles are the assumptions on which popular government rests." Lowell, *op. cit.*, p. 239.

body, what is for its own good and how best it may be obtained. Such a knowledge is not inherent or original in a body-politic any more than in a single individual, irrespective of his age, education, or mental condition. By no one is it contended that the young child or the mentally defective adult does not need the guidance of his parents or guardians. Nor can it be denied that there are communities of men without political training, or so intellectually or morally benighted, that foreign political control may be rightfully exercised over them. Even John Stuart Mill, who held radical views regarding the evil of all forms of coercion, was compelled to admit that compulsion over the individual is necessary as well as over a race, for his or its own good, until the individual or race has reached that stage of intellectual enlightenment where it is able to profit by discussion—that is, when the force of reason and argument may be applied.

Thus Mill declares, in his famous *Essay on Liberty*, that “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.” The coerced one’s “good, either physical or moral, is not a sufficient warrant.” This principle, Mill asserts, “is entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion.” But in the very next paragraph he is obliged to modify the absoluteness of this proposition by saying: “It is perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. For the same

Do people  
know their  
own good?

John Stuart  
Mill



reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. . . . Liberty, as a principle has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion."<sup>1</sup>

His principle  
relative

The qualification which Mill thus sets to his principle is, beyond all doubt, reasonable, but it wholly alters the character of the absolute thesis with which he started. This becomes a relative one, dependent upon circumstances for its application.

It remains, then, in each State to which the principle of popular government is to be applied, to determine the extent to which the people are qualified to form a just estimate of their own welfare and of the public policies by means of which it may best be secured. To this popular judgment full force and approval may be given only when the people are politically and ethically enlightened; and this enlightenment must include a knowledge which will enable the people to understand, in a measure at least, the significance of social and political conditions and appreciate the forces that influence and control community life upon its economic, industrial, and ethical, as well as upon its purely political side. Above all it is necessary that the people should have a due appreciation of the nature of government and of the fact that it is an instrumentality which is to be used, not only for protection against foreign attack and maintenance of domestic order, but for the promotion of the public good in a variety of ways.<sup>2</sup>

Importance  
of Education

A proper conception of the purpose and necessity of constitutional government must also be had, and this involves an understanding of the operation of law as an unimpassioned, impartial agency for the maintenance of justice. The very unsatisfactory political conditions

<sup>1</sup>Mill, *On Liberty* (Everyman edition), pp. 72-73.

<sup>2</sup>See above, Chap. III.



which have for so many years persisted in certain of the Central and South American States have been due, not so much to the lack of academic or scholastic education among their peoples as to the fact that they have been without any real conception of constitutionalism, of justice according to fixed and impartial law, of the true nature of political authority, of the obligations which rest upon those who are in possession of political power, and of the possible benefits which may be derived from a government intelligently and honestly administered, with the purpose of providing, in every possible way, for the public welfare.

**Problem of  
Backward  
Peoples**

It is a matter of great political importance to determine the manner in which a politically benighted people may be made competent to direct their own political destinies. This is a question which is at the basis of problems of imperial and colonial administration and the emancipation of backward peoples from political tutelage. There is much to support the view that the quickest way in which to teach self-government to a dependent and politically undeveloped people is not by exhibiting a premature eagerness to entrust them with the control of their own government, with inefficiency and possible dishonesty as a result, but by applying efficient political rule and a rigid administration of justice according to law.<sup>1</sup> In this way the people can be made clearly aware of what a good government

**The Man-  
date System**

<sup>1</sup>This problem is presented by the mandate system, which the Treaty of Versailles provided for the former German colonies:

"To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

"The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

"The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances." (Article 22).

Formation  
of Public  
Opinion

means and what are the possible benefits that may be derived from it. Then, by degrees, the governed may be admitted to participation in their own government.<sup>1</sup>

The creation of an intelligent and disinterested public opinion regarding matters political cannot be the work of a day. The instrumentalities for bringing it into existence must be the schools and colleges, the press, social and political reform associations, and, above all, the personal work and influence of those fortunate individuals who have been able to secure a specialized political education in the higher institutions of learning.

Danger of  
oppression  
always  
present

It is, however, unfortunately true, as the experience of all nations has demonstrated, that scholastic or mere academic education alone has not inherent in it the force to create good citizenship. Nor have democratic or republic institutions this power, for it has been found that, even where the right of self-government has been granted to its fullest possible extent, corruption and self-seeking upon the part of those in authority have not been absent. Nor, for this matter, has the danger of oppression of the governed been averted. History shows that a people needs almost as much protection against the governments which they themselves have established and which, in theory at least, they maintain, as they do against governments in whose creation they have played no part. Thus only by eternal vigilance can liberty be preserved.<sup>2</sup>

Popular government, therefore, offers no absolute guar-

<sup>1</sup>On the general question of governing backward peoples, see Adam Smith, *Essay on Colonies*; Mill, "Of the Government of Dependencies by a Free State," *Representative Government*, Chap. XVIII; Lewis, *Government of Dependencies*.

On mandates, see Hicks, *The New World Order*; Woolf, *Economic Imperialism and Empire and Commerce in Africa*; Johnston, *The Backward Peoples*.

On specific problems: Egypt—Chirol, *The Egyptian Question*; Report of the Milner Mission to Egypt, 1921, Cmd. (1131); India—Macdonald, *The Government of India*; Barker, *The Future Government of India*; Curtis, *Dyarchy*; Philippines—Blount, *The American Occupation of the Philippines*; Worcester, *The Philippines Past and Present*.

<sup>2</sup>"The first element of good government, therefore, being the virtue and intelligence of the human beings composing the community, the most important point of excellence which any form of government can possess is to promote the vir-

antee that, under it, civil liberty will thrive or that substantial political equality will prevail. The laws may be both unwise and unjust, and so imperfectly enforced that life, liberty, and property are insecure. And the people generally may be so inert and incompetent that, whatever may be their political rights, they in fact permit their leaders or self-appointed political bosses to wield the real power in the State. Thus there is some truth in the statement made by Justice Stephen in his *Liberty, Equality, and Fraternity* that "the man who can sweep the greatest quantity of fragments into one heap will govern the rest. The strongest man in one form or another will always rule. If the government is a military one, the qualities which make a man a great soldier will make him a ruler. If the government is a monarchy, the qualities which kings value in counsellors, in administrators, in generals will give power. In a pure democracy the ruling men will be the wire-pullers and their friends; but they will be no more on an equality with the people than soldiers or ministers of State are on an equality with the subjects of a monarchy." When Justice Stephen here states that these are necessary results he is certainly wrong. But that they are possible results cannot be questioned.

People may  
be inert  
and incom-  
petent

Possible  
dangers

Summarizing and repeating, then, what has been said, it is seen that in order that a government may be both efficient and popular, the following conditions must be present:

tue and intelligence of the people themselves. The first question in respect to any political institutions is, how far they tend to foster in the members of the community the various desirable qualities, moral and intellectual; . . . The government which does this the best has every likelihood of being the best in all other respects, since it is on these qualities, so far as they exist in the people, that all possibility of goodness in the practical operations of the government depends. . . .

"A government is to be judged by its action upon men, and by its action upon things; by what it makes of the citizens, and what it does with them; its tendency to improve or deteriorate the people themselves, and the goodness or badness of the work it performs for them, and by means of them. Government is at once a great influence acting on the human mind, and a set of organized arrangements for public business: in the first capacity its beneficial action is chiefly indirect, but not therefore less vital, while its mischievous action may be direct." Mill, *Representative Government*, Chap. II.



Essentials  
of Popular  
Govern-  
ment

1. The existence of what may truly be said to be a public opinion.
2. That this public opinion shall be intelligent and well disposed.
3. That means shall exist for giving to it authentic expression.
4. That Constitutional devices shall be created for making this public opinion, when authentically expressed, controlling upon those in political authority.
5. That an effective administrative machinery shall be established and maintained.

Nature of  
Public  
Opinion

An opinion cannot be held to be public unless it is substantially shared by a dominant portion of the community.<sup>1</sup> This does not mean that all persons must think alike, but that, upon fundamentals, they are in agreement; though differing upon unessential matters, they are able to coöperate with regard to essentials. Nor does the public opinion which popular government presupposes make impossible or undesirable the segregation of the people into different political parties holding different opinions with regard to broad public policies. But, if the political mind of the people is to be in a sound condition there should be, back of these party differences, an agreement with reference to the value of the government which is to be maintained and the national ideals which are to be realized.

The more generally an opinion is held the more public it may be said to be. In any community of men, that which is termed public opinion is a result, not of the opinions of all of its members, but only of those persons, few or many, who are led to think and to form judgments regarding matters of general interest. And it is evident that

<sup>1</sup>On the nature of public opinion, see Bryce, *The American Commonwealth*, Part IV; Lewis, *On the Influence of Authority in Matters of Opinion*; Wallas, *Human Nature in Politics and The Great Society*, Chap. XI; Dicey, *Law and Public Opinion in England*; Lowell, *Public Opinion and Popular Government*; Maine, *Popular Government*.



in any State only a certain number of citizens can be said to have clearly formed opinions as to political matters. Furthermore, it is a familiar fact that the greater number of those persons who do express political opinions base their judgments, not upon reasoned convictions enlightened by accurate knowledge, but upon prejudices, self-interest, emotional feelings, traditional party affiliations, or, most often of all, upon the assertions of others in the soundness of whose judgment they have confidence.<sup>1</sup>

Influenced  
by non-  
rational  
elements

It is this last circumstance which gives to public opinion a more reasoned basis than it otherwise would have, for, as a general proposition, it may be said that those persons whose opinions influence the opinions of others are men who have some knowledge of the matters concerned and have, to some extent at least, arrived at their own conclusions by processes of reasoning. Where this is not so and where the political leaders of the people are not men of knowledge and good judgment, what is termed public opinion must be largely without a rational basis. There is, then, no surer way of testing the political soundness of a given community than by determining the ability and honesty of its leaders. Those persons who are not able to accept the basic principles upon which an existing government rests are termed "irreconcilable," and, when they are numerous, they constitute a menace to political stability.<sup>2</sup> Thus, for a long time, the Jacobites in England and the Bonapartists in France, were irreconcilables since they were united not by any common opinion with regard to what public policies should be pursued by the existing government, but were antagonistic to the very nature of that government itself. So also in Germany, before the World War, the Social Democratic Party differed so fun-

Irrecon-  
cilable  
Parties

<sup>1</sup>For a brilliant discussion of the influence of the press, see Lippmann, *Liberty and the News*. Of interest also are Hayward and Langdon-Davies, *Democracy and the Press*, and Baumann, *The Press: Its Power, its Function, and its Future*.

<sup>2</sup>See Lowell, *Public Opinion and Popular Government*, p. 32 ff.

The Social  
Democrats

damentally from the other parties with regard to the maintenance of monarchical powers that a coöperation between it and those in authority was almost impossible. And thus we find that the Kaiser and his Chancellor, though willing by various concessions to seek the support of the other political parties in the *Reichstag*, were never willing to have dealings upon any terms with the Social Democrats. There can be no doubt that this chasm between the Social Democratic and the other political parties has been a serious evil in German political life and partially explains the slowness with which true popular government has developed in that country.<sup>1</sup>

Irish  
Home Rule  
Party

In England the Irish "Home Rule" Party has exhibited irreconcilable characteristics, in that it has shown a willingness to bring parliamentary government to a complete standstill in order to force a concession to its demands. Thus Professor Redlich in his *History of Procedure in the House of Commons*, speaking of Parnell, says that he "adopted and used obstruction, not as a method of parliamentary warfare but as a weapon with which to combat and, if possible, to destroy, the united parliament as a constitutional device."<sup>2</sup> This led, in January, 1881, to the memorable sitting at which the Speaker, supported, of course, by the Ministry, assumed the dictatorial power of refusing to allow the debate to continue and putting the question to passage forthwith. And, as is well known, this led to the adoption by the Commons of rules of procedure which, since that time, have enabled the party in power to overcome the resistance of those members who may desire to prevent parliamentary government from functioning.<sup>3</sup>

<sup>1</sup>Cf. Bevan, *German Social Democracy*.

<sup>2</sup>On Parnell as an irreconcilable, see McCall, *The Business of Congress*, p. 86.

<sup>3</sup>This incident has been interestingly described by Baumann, *Persons and Politics of the Transition*, pp. 27-30.

"During the eighteenth and the first half of the nineteenth century, the House of Commons was governed by custom and precedent, the '*lex et consuetudo Parliamenti*', which were left to the Speaker and the clerks at the table to enounce.

The Poles in Prussia, the Italians in Austria and, to an extent, the inhabitants of Alsace and Lorraine in the German Empire have constituted irreconcilable political elements; and it does not need to be said that in all countries anarchists are irreconcilables of the worst type.

It is unfortunate for a country and seriously interferes with the formation in it of a true public opinion when political parties are made up of members from certain territorial areas or from defined social or industrial classes, or are united by principles which have no organic connection with the general policies of the State. A true public opinion is one that more or less pervades all classes of the community. When, then, we have political parties like the Clericals in many of the European countries, or parties made up almost exclusively of certain economic classes, such as landlords, labor unionists or day-laborers and

Class  
divisions  
and sec-  
tionalism

Speaker Onslow would tell Sir Robert Walpole or Mr. Pitt that the rule was so-and-so, and if the Chair was doubtful or disbelieved, an order would be made to search the Rolls of Parliament, or the Journals of the House, to find a precedent. All this answered admirably so long as the House of Commons was what Professor Redlich calls 'socially homogeneous,' *i.e.* composed of English gentlemen of similar habits and education, not too much in earnest, who recognized the standing orders as the rules according to which a pleasant and exciting game was to be played . . . 'the observance of understandings' on which every Constitutional Government depends was rudely abandoned by the Irish Nationalists. Parliamentary obstruction, like most other great inventions, was discovered by a man quite unknown to fame, one Ronayne, an Irish Nationalism member, who communicated his idea to its first and most celebrated practitioner, Joseph Biggar. . . . Parnell, who was elected in 1875, saw at a glance the genius of Ronayne's and Biggar's idea. Once recognize that all parliamentary rules and conventions are, as Biggar said, 'nonsense,' and the opportunities of warfare are infinite. But it was not until the next Parliament, elected in 1880 with a Liberal majority, that both parties saw the necessity of making essential changes in the rules of business. Parnell and his style of fighting were at first regarded as a phenomenon that would pass as other Irish leaders and their methods had passed. But at length his energy and seriousness 'shook the parties and their leaders out of their sleep. Their eyes were opened, and they saw obstruction in its true character as parliamentary anarchy, a revolutionary struggle, with barricades of speech on every highway and byway to the parliamentary market, hindering the free traffic which is indispensable for the conduct of business.' As Mr. Timothy Healy said one night, 'It is no longer a question of argument, but of *avoir du pois*.' . . . successive Governments have done nothing but tamper with the rules of procedure, modifying or abolishing old rules, and passing new ones, until the Standing Orders of the House of Commons make quite a complicated chapter of technical knowledge. . . . The object of all these changes is to expedite by curtailing discussion, an end which has been partially attained, but at the cost of almost everything that makes parliamentary institutions valuable."



property-less persons, we have a condition of affairs in which groups of the electorate are not seeking in a broad way the successful administration of the existing government, but are striving to obtain certain specific results which will be of advantage only to their own members. The line which separates such parties from "irreconcilables" is not a very distinct one and can possibly be traced only by the fact that, in order to obtain their own ends, they are not willing, as the irreconcilables are, to overturn the existing government or to bring its operations to a standstill.

Defects of  
numerical  
results

From what has been said, it is seen that a true public opinion is not a mere matter of obtaining an arithmetical sum of individual opinions. It is true that in all popular governments numerical results (sometimes a plurality or a majority, in other cases a larger vote) are accepted as expressing the popular will. This however, is but a *pis aller*, recognized to be highly imperfect, but adopted because no better means is practicable. Accurately to ascertain the general will, the vote of each individual should be given a weight proportionate to the intelligence of the person who casts it. In some instances this is attempted in a rough way by the imposition of educational qualifications for the exercise of the suffrage. But in general it is recognized that the government has not at its command the means for discriminating accurately between voters except upon obvious and formal lines, as for example, age, residence, sex, etc., and that the attempt to allow election officials to grant or refuse the ballot upon other grounds opens the way to extensive partisan abuses.<sup>1</sup>

Suffrage  
tests

A more practicable way of giving to intelligence and ability their due weight in the control of government than is provided by elaborate suffrage tests, is to make provision

<sup>1</sup>On theories of suffrage, see Mill, *Representative Government*, Chap. VIII; Sidgwick, *Elements of Politics*, Chap. XX; Porter, *History of Suffrage in the United States*; Dupriez, *Le Suffrage universel en Belgique*; Lecky, *Democracy and Liberty*.



for the representation in the legislature of certain definite interests or classes, as, for example, to permit colleges and universities, chambers of commerce, learned associations and the like to send representatives of their own choosing to take their seats alongside of, and with equal voting rights to the representatives elected by the general vote of the people. Representation of economic classes, however, would tend to create irreconcilable groups, the conservative influence of a two-party system would be dispensed with, and disruptive effects would be probable. The proposal, nevertheless, raises one of the most interesting questions in the problem of representative government.<sup>1</sup>

**Representa-  
tion of  
interests**

Granting that there exists an opinion regarding political matters which is intelligent and properly disposed, and which is truly public, it is necessary, as has been said, that agencies should exist for its authentic expression. The vagueness and generality of the "General Will" of the People, must be rendered definite and specific. The accomplishment of this purpose is the function of political parties, voluntary associations, and representative assemblies. It is hardly necessary to add that elections must be free, the electorate incorruptible, and the right assured the people to speak, assemble publicly, and petition, subject only to those restraints of law which public order and morality make imperative.

In the chapters which follow the functions of political parties and of representative legislative chambers as agencies for the formulation and expression of the will of the people will be discussed in some detail; but before proceeding to those topics it may be pointed out, as a general observation, that, in order that a government may be enlightened and controlled by public opinion, it is not necessary that all, or even a considerable number of the public functionaries should owe their office to popular appoint-

**Agencies for  
expressing  
the popular  
will**

<sup>1</sup> It will be considered more in detail later.

Officials  
amenable  
to popular  
control

ment, or that their terms of service should be definitely fixed. All that is needed is that those officials who participate to any extent in the determination of the policies of the State should be amenable to popular control. Thus, it is generally admitted that those who interpret and apply the law in courts of justice should be removed as far as possible from partisan political control, and that, therefore, judges should enjoy long terms of office, if not a life tenure. This doctrine of judicial independence requires to be modified only when these judges show a deliberate and sustained disposition to color their interpretations of the law by their own personal convictions regarding the justice or economic and political expediency of the laws which they interpret; in other words, when they display a desire to participate in the policy-forming function of the government. The opportunity for the judiciary thus to intrude itself into the legislative field is greatly widened in the United States by reason of the fact that our courts are recognized to have the authority to hold invalid and refuse enforcement to laws which, in their judgment, contravene constitutional provisions. Just to the extent to which it may justly be said that our courts have, in the exercise of this authority, set themselves unnecessarily and unreasonably in opposition to the legislative will, and thus, in effect, arrogated to themselves legislative functions,<sup>1</sup> to this extent it is in conformity with the fundamental principle of popular government that a greater popular control over the judges should be exercised, whether by way of impeachment, recall, short terms of office, or popular reversal of their decisions.

Judicial  
review

The primary function of the legislative branch of a government is to formulate and promulgate in legal form the will of the State. If the government is to be a popular

<sup>1</sup>The extent to which the power of judicial review has been exercised is described by Moore, *The Supreme Court and Unconstitutional Legislation* (Columbia University Studies, Vol. LIV, 1913), and Warren, "The Progressiveness of the Supreme Court of the United States," *Columbia Law Review*, Vol. XIII, p. 294 (1913).

one, it is indispensable that the members of this body should be selected by the people and be made responsible to their will through the necessity of returning to them, at brief intervals, for reëlection. Whether or not the representatives should act merely as agents of the people and in their actions obey with fidelity the instructions which they receive from their constituencies; or whether they may be recognized to have the right, and indeed to be under the obligation to exercise an independent judgment of their own with regard to what policies they conceive the public welfare to dictate, is a matter which depends upon circumstances of time, place, and people.

With respect to the executive branch of the government, it is now well recognized that all those public officials who perform either purely routine or ministerial acts, as well as those who execute the more technical tasks of administration, should enjoy terms of office that are comparatively permanent, and that they should be selected, not for politically partisan reasons, but upon a basis of intellectual and moral justification for the tasks which they are to perform. In short, they should be public functionaries. As to those executive and administrative officials, however, who, as chiefs of bureaus or divisions, have policy-making powers—it is desirable that they be kept in close touch with, and responsible to, public opinion.

Almost universal experience has shown that the popular selection of officials who either determine the public policies which are to be pursued or the spirit in which they are to be enforced, is best performed when their choice is not complicated by the necessity, upon the part of the people, of selecting also the minor ministerial officers. This is due to two reasons. In the first place, it is not practically possible for the electorate generally to form an intelligent and accurate estimate of the merits of the candidates when a large number are submitted to their judgment. In the second place, not only is accurate information rendered

Legislative  
and Execu-  
tive  
Branches

Nomina-  
tions and  
elections



**Power of the  
"machine"**

impossible, but the popular interest is so diffused and dissipated as to destroy, in large measure, even the will, and therefore the deliberate attempt, of the people to exercise an independent and individual choice either in the nomination or the election. The "machine" is permitted to nominate, and the persons thus selected are voted for upon purely partisan grounds. This is recognized by the "machine" and the deliberate effort is often made to direct the attention and interest of the electorate from the unfitness of those whom the practical politician especially desires to have elected by the nomination of especially good candidates for the other offices, thereby strengthening the ticket and securing its approval as a whole by the electorate, but with a result that those offices which, because of their nature and functions, are especially valuable to the "machine" are filled by its assured henchmen. This device is rendered especially easy of employment when the official who, as for example, one of our governors, is nominally, and from the viewpoint of dignity, the chief, is in reality without considerable administrative importance or powers of patronage.

**The Short  
Ballot**

In effect, then, by limiting the number of elective offices—the adoption, in fine, of the "Short Ballot"—the effective control of the people, through their votes, of their own government, is increased. With but few names appearing on the ballot, not only is each voter enabled to inform himself as to the respective qualifications of the candidates, but interest is centered upon these few.<sup>1</sup>

It is, however, to be observed that if the "Short Ballot" is to be adopted, it is necessary, in order that the popular control of the whole administration shall be effective, that these executive chiefs, thus held responsible to the people, should be endowed with powers of appointment, of removal, and of administrative control of subordinates which

<sup>1</sup>Cf. R. S. Childs, *Short Ballot Principles*, and A. M. Kales, *Unpopular Government in the United States*.



will enable them to secure an enforcement, in good faith, of the policies which the people have approved. This means that there shall be administrative integration and centralization—a prerequisite that is sadly lacking in the governments of the states of the American Union, and not as fully satisfied as could be desired even in the government of the Union.

Before we leave the general subject of popular government, however, attention should be called to a recent article by Professor J. T. Shotwell.<sup>1</sup> Three main facts, he says, stand out of the political history of Europe and America. Two of these are familiar and have already been pointed out: (1) the “steady growth of representative government by means of the widening of the electorate, which now, at the close of the war, extends over practically the entire citizenship,” and (2) “the scope of government has increased almost as notably as the suffrage” and “the machinery of government in the modern State has grown so vast and intricate as to defy the analysis of all but the most highly specialized experts.”

The third fact, however, frequently seems to escape notice. In Professor Shotwell’s words, it is this: “Both the extension of the suffrage and the extension of the scope of government have increased the possibilities of corruption. Personal responsibility grows ever more difficult to place.” But, “apparently, parallel with the enlargement of the suffrage and the extension of the scope of government, there has been not a decline but a steady growth in public honesty. If this be so, the fact is of the utmost significance, for it means that a study of the past may relieve us of at least half our anxiety about the future. Distrust in democracy is twofold: distrust in its moral integrity and distrust in its capacity for affairs. If his-

Tendencies  
of Popular  
Government

Political  
morality

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<sup>1</sup>“Democracy and Political Morality,” *Political Science Quarterly*, Vol. XXXVI, p. 1 (March, 1921).

tory can remove the former, the question narrows down to the simple, but as yet unsolved issue of efficiency."<sup>1</sup>

#### TOPICS FOR FURTHER INVESTIGATION

The Press and Public Opinion.—Lippmann, *Liberty and the News*; Lowell, *Public Opinion and Popular Government*; Dicey, *Law and Opinion in England*; Sinclair, *The Brass Check*; Baumann, *The Press: Its Power, its Function, and its Future*; Bryce, *The American Commonwealth and Modern Democracies*.

Theories of Suffrage.—Seymour and Frary, *How the World Votes*; Porter, *History of Suffrage in the United States*, and above, p. 120.

The Government of Backward Races.—For references, see above, p. 114.

The Short Ballot.—Childs, *Short Ballot Principles*; Munro, *The Government of the United States*; Bryce, *Modern Democracies*.

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<sup>1</sup>On the other hand, an anonymous English writer attaches great importance to the fact (also discussed by Professor Shotwell) that, when legislation regulates different economic interests of the community and is dependent on so many personal factors, the problem of corruption may tend to elude analysis. More than this, the motive is political success, rather than public service. Thus, the anonymous Englishman says:

"We suffer the great modern work of national administration to be blended with, and perverted by, a political system which is thoroughly tainted; and the taint spreads through the army and navy and civil services which depend upon the political system. Instead of choosing administrators on the ground of their ability, we see our democratic choosers drenched by an outpour of insincere oratory and promises, and enmeshed in a network of paid enterprise and organization, the power of which they fail to perceive. We find this organization centring about the persons of a few professional, and to a large extent hereditary politicians, who fight each other much as the Blues and Greens fought in the ancient Roman Circus." *The Taint in Politics: A Study in the Evolution of Parliamentary Corruption*, p. 22 (London, 1920).

## CHAPTER VIII

### POLITICAL PARTIES

IN EVERY country where the will of the people determines the policy of the State, political parties exist, and they may therefore be said to be one of the concomitants of popular government. Indeed, upon any consideration of the matter it appears but reasonable that those persons who hold substantially similar views upon any subject should draw together into coöperative effort to attain the ends which they desire, and the same phenomenon is observable in forms of human association like trade unions and churches. None is entirely free from division of opinion, or even factional fights.

Coöperation  
to attain  
political  
ends

Not every group of individuals, however, who act together in order to exercise a united influence upon the government, can be said to constitute a true political party. Thus, when an association of individuals is formed to secure certain legislation, as, for instance, liquor prohibition, or an eight-hour labor day law, the aim is not to secure the entire control of the government in order to carry out a general body of political principles, but only to influence the government, by whomsoever it is administered, to adopt a certain specific policy. It is only when a group is united by general political policies, the carrying out of which necessitates the control of all of the policy-forming organs of the government, that it can be said to constitute a political party.<sup>1</sup>

Non-political  
associations

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<sup>1</sup>"Party is a body of men united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed. . . . It is the business of the speculative philosopher to mark the proper ends of Government. It is the business of the politician, who is the philosopher in action, to find out proper means toward those ends, and to employ them with

Rousseau in his famous "Social Contract" was so impressed with the incompatibility between the expression of a true "General Will" of the people and the grouping of citizens into smaller units, that he urged that, if possible, these groups be prevented.<sup>1</sup> Rousseau, however, did not sufficiently appreciate that true political parties, as distinguished from mere factions, or groups of irreconcilables, may be formed which, though differing among themselves as to certain matters, are yet in fundamental agreement as to the nature and ends of the government under which they are living.

Origin of  
party  
feeling

Back of all political parties undoubtedly lie certain cementing influences which have little relation to policies of state.<sup>2</sup> Mere selfish interests, and the desire to obtain possession of the public offices with whatever dignities,

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effect." Burke, *Thoughts on the Cause of the Present Discontents* (Select Works, Oxford Edition), Vol. I, p. 86. A little reflection on this definition will show that it is too ideal to fit the facts of present-day politics: the union is frequently illusory, the national interest is subordinated to personal and party interest, and the principles do not command general agreement except so far as they hold that party success desirable.

On political parties generally, see M. Ostrogorski, *Democracy and the Organization of Political Parties*; E. Faguet, *The Cult of Incompetence*; A. V. Dicey, *Law and Opinion in England*; F. W. Rafferty, *The Future of Party Politics*; Laveleye, *Le Gouvernement dans la démocratie*; Treitschke, *Politik*, Vol. I, p. 150 ff.; Wallas, *Human Nature in Politics*, and A. L. Lowell, *Public Opinion and Popular Government*.

<sup>1</sup>"If, when the people being furnished with adequate information, held its deliberations, the citizens had no communication with one another, the grand total of the small differences would always give the General Will, and the decision would always be good. But when factions arise, and partial associations are formed at the expense of the great association, the will of each of these associations becomes general in relation to its members, while it remains particular in relation to the state; it may then be said that there are no longer as many votes as there are men, but only as many as there are associations. The differences become less numerous and give a less general result. Lastly, when one of these associations is so great as to prevail over all the rest, the result is no longer a sum of small differences, but a single difference; in this case there is no longer a general will, and the opinion which prevails is purely particular." *Social Contract*. Book II, Chapter III.

<sup>2</sup>"Whatever its origin, every party lives and thrives by the concurrent action of four tendencies or forces, which may be described as those of Sympathy, Imitation, Competition, and Pugnacity. Even if intellectual conviction had much to do with its creation, emotion has more to do with its vitality and creative power. Men enjoy combat for its own sake, loving to outstep others and carry their flag to victory." Bryce, *Modern Democracies*, Vol. I, p. 112.



powers or perquisites may be attached to them, are in all cases influential. Sir Henry Maine in his famous volume, *Popular Government*,<sup>1</sup> ascribed the rise of political parties in large measure to the mere combativeness which seems to be inherent in varying degree in almost every one. Eminent German political scientists have traced not only the origin but the kinds of political parties back to the psychological characteristics which different persons exhibit.<sup>2</sup> Thus it is claimed that in all countries political parties are naturally divided into Liberals and Conservatives, the former being divisible into Radicals and Moderate Liberals, and the latter into Moderate Conservatives and Reactionaries. The young, the optimistic, the idealists naturally tend, it is asserted, to group themselves under the banner of the Liberals; whereas the Conservatives naturally attract to their standard the elder, more sober-minded, less optimistic and realistically inclined persons.<sup>3</sup>

Nature of  
party  
groupings

In these views there may be a certain amount of truth, but the chief explanation for the grouping of voters into different political camps lies much nearer the surface. Family traditions, social and business connections and, above all, self-interest, furnish the real reason why the great majority of voters belong to the particular party of

Traditions  
and self-  
interest

<sup>1</sup>"Party feeling is probably far more a survival of the primitive combativeness of mankind than a consequence of conscious intellectual differences between man and man. It is essentially the same sentiment which in certain states of society leads to civil, intertribal, or international war, and it is as universal as humanity." (p. 37). Michels (*Political Parties*) follows Sir Henry Maine in connecting the party system with primitive instincts. Michels' book is also of interest as showing that every democratically organized party soon develops an oligarchy. This conclusion is of great interest to W. H. Mallock, *The Limits of Pure Democracy*, Book I, Chap. V. Cf. also Laveleye, *Le Gouvernement dans la démocratie*, Vol. II, p. 87 ff, who would guard against the perils of the party system by minority representation, etc.

<sup>2</sup>See Lowell, *Public Opinion and Popular Government*, p. 65. A Danish writer suggests that national and religious ideas and constitutional theory are usually secondary. Arthur Christensen, *Politics and Crowd Morality*, p. 183.

<sup>3</sup>Cf. Lord Macaulay's famous comparison of political parties to the fore and hind legs of a stag. Macaulay, of course, belonged to the party represented by the forelegs. The analogy holds good to the extent that Conservatives, placed in office, tend to become liberal in order to make a record, and Radicals, in office, become conservative to avoid doing harm, but the difficulty is that the front and hind legs do not always want to go in the same direction.

Conscious  
choice is in-  
frequent

which they are members. This is not to say that in most cases the individual voter does not feel convinced that the party to which he belongs can best secure the welfare of the State if placed in control of its government. But in fact the evidence is overwhelming that only in isolated cases can this be truly said to be the manner in which political conviction has been arrived at. The fact that in so many cases the son votes as his father voted, or that the electorates of whole localities are overwhelmingly of one political belief whereas the electorate of another locality is of an opposing opinion, each holding the view which, if adopted, will be to its special benefit—these facts alone are sufficient to show that pure reason must at least share with other forces the credit of producing political opinions.

Attacks on  
party  
system

One should not lose sight of the fact, moreover, that party government has been subjected to some violent attacks and that its present, almost universal acceptance, is due not so much to belief in its validity, as to the impossibility of securing any substitute which would not be far worse. "Party government in England," it has been said—and the opinion is not inapplicable to other countries as well—"is the least promising in theory of all methods yet adopted for a reasonable management of human affairs. In form it is a disguised civil war, and a civil war which can never end, because the strength of the antagonists is periodically recruited at the enchanted fountain of a general election. Each section in the State affects to regard its rivals as public enemies, while it admits that their existence is essential to the Constitution; it misrepresents their actions, thwarts their proposals even if it may know them to be good, and by all means, fair or foul, endeavors to supplant them in the favor of the people."<sup>1</sup>

Or, as was said a good many years ago, by another British publicist:

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<sup>1</sup> J. A. Froude, *The Earl of Beaconsfield*, p. 153.

The evils which flow from this [the party] manner of conducting public affairs are manifest. The two greatest unquestionably are, first, the loss of so many able men to the service of the country, as well as the devotion of almost the whole powers of all leading men to party contests, and the devotion of a portion of these men to obstructing the public service instead of helping it; and next, the sport which, in playing the party game, is made of the most sacred principles, the duping of the people, and the assumption of their aristocratic leaders to dictate their opinions to them.<sup>1</sup>

It is worth while noting, furthermore, that—as was the case with the League of Nations in the senatorial debate—the party system is attacked both from the Right and from the Left. The delays and compromises of politicians, and their primary concern about retaining office to the apparent subordination of the safety of the State are subjected to attacks by Tory,<sup>2</sup> and the revolutionary socialist rejects political action altogether: the programme is to form industrial combinations rather than political ones. “The work-shop, and not the House of Commons, must be the scene of the conflict; economics, not politics, must be its issues.”<sup>3</sup>

The primary purpose of political parties is to be successful in elections, and consequently organization is necessary. In some countries, of which the United States is perhaps the best example, there are established elaborate political party machineries directed by men who follow definite

From both  
the Right  
and the  
Left

Direct  
Action

Functions  
of Political  
Parties

<sup>1</sup>Lord Brougham, “Effects of Party,” *Historical Sketches of Statesmen Who Flourished in the Time of George III*, p. 172.

<sup>2</sup>Cf. F. S. Oliver, *Ordeal by Battle*, Part III. There is comfort for the faithful, however, in F. J. C. Hearnshaw, *Democracy at the Crossways*.

<sup>3</sup>Cf. J. Ramsay Macdonald, *Syndicalism and Parliament and Revolution*; William Mellor, *Direct Action*. There are amusing, albeit bitter remarks in Hilaire Belloc and Cecil Chesterton, *The Party System*. An interesting volume dealing with American politics is A. M. Kales, *Unpopular Government in the United States*. Of value also are F. W. Jowett, *What is the Use of Parliament?* and Edward Melland, *A Plea for Parliamentary Government*. Mr. Melland quotes Thackeray's dictum: “We do not call it lying; we call it voting for our Party,” and the ideal of Mr. W. S. Gilbert's man, who

Always voted at his Party's call,  
And never thought of thinking for himself at all.



Extra-  
govern-  
mental  
organization

rules and regulations. Within recent years the attempt has been made in the United States to subject these organizations to certain legal restrictions, but, from the nature of the case, this regulation cannot be carried very far, for these organizations are of course voluntarily formed by the groups of voters and exist outside of the governments whose operations it is their aim to influence and control. In a sense, it may be said that it is their function to perform certain tasks which the legal government neglects or is unable to perform; and thus we find that the part played by party "organizations" in the political life of a people is very largely determined by the character of the government which is supplied to them by constitutional law. In all States the activities of party organizations include:

Political  
propaganda

1. The carrying on of a political propaganda for the spread of the special doctrines held by the party. This is a function that is continuously maintained through the press, by public speaking, etc., but is particularly energetic just preceding important elections.<sup>1</sup>

2. The definite formulation of the policies for which the party is to stand. These, of course, find expression in party platforms or other authorized statements.

<sup>1</sup>Christensen (*op. cit.* p. 54) suggests that political propaganda consists of four main ingredients: (1) the assertion of abstract party dogmas; (2) an attack on the other party; (3) an indication of the fitness of the party and its leader, and (4) promises of material benefits. But this analysis too completely ignores psychological factors. In the general election of December, 1918, for example, Mr. Lloyd George gave the English people an electioneering window-show and went to the country on pledges of (1) hanging the Kaiser; (2) making Germany pay, and (3) transforming Britain into a "fit country for heroes to live in." It was evident that the first pledge would not be carried out and that the second—if insisted on to the extent indicated on the hustings—would be in violation of the armistice agreement, to say nothing of the fact that Germany's financial condition made it well nigh impossible. The third pledge was couched in vague terms and coupled with abuse of opponents as advocates of Bolshevism and appeals to the electorate to show their gratitude by returning candidates approved by the Government which had won the war. "The spirit in which the election was fought, especially by the victorious party, showed small appreciation of the true qualities of the British people or of the faith in democracy so frequently proclaimed during the war." *The Round Table* No. 34, p. 356 (March, 1920). The most reasonable explanation of the phenomenon is that the mind of the electorate was still living in the days before the armistice.

A similar opinion may be expressed on the unreality of the American election



3. The nomination of the candidates for public offices for whom the members of the party as well as others are to be urged to vote.

4. The conduct of election campaigns, which involves the use of every conceivable device for convincing or persuading the voters that the policies and candidates of the party are to be preferred to those chosen by its rivals.<sup>1</sup>

5. The controlling or influencing, after election, of the policy-forming organs of the government with the view to seeing to it that the party promises are carried into effect. Only too often, however, when a party is once in power, the political leaders are more interested in maintaining themselves in authority and in dividing up the offices and other perquisites of government, than they are in the faithful fulfilment of the policies which they have announced and the pledges which they have given to the people. It

Office the  
chief  
object

of 1920. Interpreting the will of a Democracy is always a difficult task and too frequently the loudness of the voice makes its words indistinguishable. Thirty million voters went to the polls on November 2nd, presumably to express their opinions: but, except that Senator Harding was to become President, and that both the House of Representatives, and the Senate were to be Republican by large majorities, the voters spoke in indistinct terms. The only certain thing is that an overwhelming number of them wished to repudiate President Wilson and all his works. Apart from this, however, President Harding and the Republican party would be very rash to maintain that they had a mandate for any particular course of action. On every issue other than that of President Wilson and a desire for a change the poll was indecisive. The issue of the Treaty of Peace might have been expected to develop a cleavage which would have compelled an intelligent decision, but instead there was hopeless rodomontade; neither candidate defined his position, and neither touched the real issues of foreign politics. The recognition of the Bolsheviki, the growing divergence of British and French policy, Germany's reparation payments, Mr. Keynes's arguments against the Treaty of Versailles, financial assistance to permit the economic recovery of Europe—if the candidates had heard of these problems they ignored them as over their heads or too full of high explosive. On important questions of a more domestic nature relating to finance, armaments, agriculture, housing, transport, labor, and civil liberty—all of these will have to be dealt with in the near future—the party platforms were ambiguous and the candidates took no definite line. Only a very rash man would seek to indicate any essential difference between the Republican and Democratic parties; both claim to be the front legs of the stag which, Macaulay said, represented the natural division of men into political groups. With equal truth both parties could claim to be represented by the hind legs.

<sup>1</sup>The recent presidential campaign was extremely vulgar. The disguised civil war which every general election in the United States brings about is never very dignified, but the last campaign was worse than previous contests. The

should be remembered, however, that the selfishness of party is one of the motive forces of the machinery of government.<sup>1</sup>

This bare outline of the normal activities of political parties is sufficient to show that elaborate and permanent organizations must be maintained; for in the intervals between elections the campaign of education must be carried on, new recruits obtained, defections from the ranks prevented, and, above all, an organization kept in existence ready for the strenuous work of conducting the campaign when the time for elections recurs. And, after election, even if in a minority, it is necessary that the party's representatives both in and outside of the government should be on the *qui vive* to restrain, as far as possible, the party in power from making a misuse of its position, and to point out to the electorate those instances in which it is conceived that those in executive or legislative authority

Continuous  
activity  
required

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task of the party managers was to "sell" their candidates to the people; they had elaborate organizations reaching to every hamlet and spent huge sums, but, in addition, they used the same methods which have proved successful with baseball players, actors, toilet soaps, and breakfast foods. Every possible emotional appeal was made. The gastronomic and literary tastes of the candidates received about equal space in the press and no detail of their private lives was too trivial for exploitation to secure votes. They were photographed thousands of times, in good clothes and old clothes, and the prices they paid for them and for shoes were stressed; for low prices proved that the candidates would not be profligate with the public funds. The fact that Vice-President Coolidge only paid \$35 a month rent for his house was given more attention than his political opinions. The candidates played golf, plowed, and milked and caressed cows that sportsmen and farmers might be influenced by seeing the pictures in the illustrated papers or on the screen. Senator Harding posed with his head through the neck of a huge horn (it is said that he once played in a band) and Governor Cox showed fatherly love by permitting a photographer to snap him while his lips were pressed to those of his half-grown son. The campaign offered abundant material for a psychological study of politics, and the orgy of sentimentalism and the pandering to the emotions rather than appealing to the intellect were, it may be suggested, entirely independent of the fact that women entered the political arena for the first time under the aegis of the federal amendment. To the student of politics who has any faith in democracy as a form of government, the contest and its negative result furnished bitter disillusionment. American politics reached their nadir and the compensating advantages are rather doubtful.

<sup>1</sup>It should not be forgotten, also, that political parties help to educate the electorate on current public matters. The question of providing a definite and continuous responsibility for the government is dealt with later.

have not acted honestly or with an intelligent regard for the general welfare of the state or of its people.<sup>1</sup>

In all states of any considerable size these political party organizations have developed for themselves hierarchical organizations, beginning with local organizations in each of the smaller political subdivisions of the state, the primary functions of which are to represent the political interests of their own localities and to select representatives who are to unite with the representatives of other districts in order to provide a party organ whose duty it is to attend to the party's interests in the larger district of which the smaller areas are constituent parts. These party organs thus built up in the larger districts, in turn provide representatives for the party's organ in the next larger area, until at length the central organ of the party for the entire state is created.

Elaborate  
organiza-  
tions  
necessary

In theory a party organization necessarily is founded upon the direct democratic basis of the entire body of members. The assembling or voting of the members of a party within a given district is therefore known as a "primary." As the larger areas are reached the representative principle is necessarily employed, but even here it is not unusual to make provision in certain cases for consulting the wishes of the entire body of voters who, by registration, or by voting at the last preceding election, have shown that they have a right to claim membership in the party and to participate in its councils. In only very few instances, as, for example, was the case with the German Social Democrat party, is the payment of any fee required as a condition admitting to the full rights of party membership.<sup>2</sup>

On a  
democratic  
basis

<sup>1</sup> But as Disraeli well knew and as he phrased it in his *Lord George Bentinck*, "There are few positions less inspiring than that of the leader of a discomfited party."

<sup>2</sup> See the brilliant article by Carlton J. H. Hayes, "The History of German Socialism Reconsidered," *American Historical Review*, Vol. XXIII, p. 62 (October, 1917).



Political party organizations are organizations of voters freely and voluntarily formed for the attainment of common ends. With them, however, as with all other human associations, there is an almost irresistible tendency for the actual controlling power and authority to fall into the hands of those few persons who are willing and have the time and ability to practice those arts by means of which executive control is obtained and exercised. Thus arises a class of politicians known as "bosses" who frequently hold no public office but, by the power which they have to control the working of the party machinery, are able to dictate in very large measure who the party's candidates shall be, what public policies shall be declared, what legislation shall be enacted, and the manner in which the discretionary powers of those in the executive service shall be exercised. Thus they are also able to secure offices, public contracts and other favors from the government for themselves or their friends, or to obtain large sums of money from business interests in return for legislative or executive action which, for their own selfish interests, they may desire.<sup>1</sup>

This condition of affairs has most unfortunately existed or still exists in very many of the states, cities and other political subdivisions in the United States, and the national government has been by no means free from it. The result is that the very instrumentalities which the people have created for the realization of their own popular will, have been turned against themselves, so that, whatever may be the republican character of their government or the force and democratic character of their party organizations, in actual fact they are subjected to the more or less arbitrary and often selfish and corrupt control of a few self-selected professional politicians.<sup>2</sup>

<sup>1</sup>See, S. P. Orth, *The Boss and the Machine*; E. L. Godkin, *Problems of Modern Democracy*, Chap. IV; Munro, *The Government of American Cities*, and the references given there.

<sup>2</sup>A. M. Kales, *Unpopular Government in the United States*.

Party  
"bosses"

Unpopular  
Government



Such an untoward result as this would of course be impossible if all citizens, or even if a resolute minority of them would take an active and unselfish interest in good government, attending primaries, exercising their other rights as voters and party members, and waging a relentless warfare against all those persons who seek to employ improper means to obtain party preferment or, having secured this preferment, improperly employ the influence and authority thus obtained.

Possible  
because of  
popular  
apathy

But, until the public conscience of the average voter is more deeply stirred than it is likely to be within the near future, the readiest relief from the evils of party government must be sought through law by the establishment of certain political devices the aim of which is to weaken in part the strength of party government itself, and, in part, to make it easier for the rank and file of the members of the party to control their own party machinery. The desirability of this second aim can scarcely be questioned, but the first aim—that of weakening or destroying party government itself—is highly disputable, for the functions which political parties play in all governments subject to the control of public opinion are ones which must be somehow performed if real popular government is to be maintained.<sup>1</sup> It is indispensable therefore that some agency should exist for this purpose, and as yet no one has been able to suggest any efficient means, other than that of political parties. This phase of the subject will, it is believed be made especially evident in the pages which are to follow in which is shown the part played by political parties in the United States and in England in crystallizing and

Methods of  
avoiding  
evils

<sup>1</sup>“If all men took a keen interest in public affairs, studied them laboriously, and met constantly in a popular assembly where they were debated and decided, there would be no need of other agencies to draw attention to political questions. But in a modern industrial democracy, where the bulk of the voters are more absorbed in earning their bread than in affairs of state, these conditions are not fulfilled, and in case no one made it his business to expound public questions or advocate a definite solution of them, they would commonly go by default.”  
A. L. Lowell, *Public Opinion and Popular Government*, p. 61.

formulating public opinion, in coördinating the work of the executive and legislative branches of government and in locating political responsibility.

In France, it can be shown that very considerable political evils result from the fact that political parties function so inefficiently;<sup>1</sup> and in Prussia and the German Empire, the lack of real popular government went hand in hand with the slight control exerted by party organizations over the executive, though this was perhaps the result rather than the cause of the autocracy which prevailed.<sup>2</sup> In Switzerland, where popular government exists, political parties are without great control in matters of administration, but this is due to special conditions which make possible, upon the one hand, the effective employment of the direct democratic devices of the initiative and referendum, and, upon the other hand, a union of the executive and legislative branches of government which would probably not be workable if Switzerland were not internationally neutralized and had a larger population and a more complex industrial and commercial life.<sup>3</sup>

In general it may be said that the soundest political condition exists when there are not more than two well organized and opposing political parties.<sup>4</sup> These mutually

<sup>1</sup>The best treatment (in English) of French political parties is E. M. Sait, *Government and Politics of France*, Chap. X. Of value also is J. W. Garner, "Cabinet Government in France," *American Political Science Review*, Vol. VIII, p. 353 (August, 1914), and a very interesting recent book is Buell, *Contemporary French Politics*.

<sup>2</sup>F. Krüger, *Government and Politics of the German Empire*, Chap. XVII; Ogg, *The Governments of Europe* (rev. ed.), Chap. XXXVII; A. L. Lowell, *Governments and Parties in Continental Europe*, Vol. II, Chap. VII; W. H. Dawson, *Bismarck and State Socialism*.

<sup>3</sup>R. C. Brooks, *Government and Politics of Switzerland*; F. A. Ogg, *The Governments of Europe*, Chap. XXXIII; F. Bonjour, *Real Democracy in Operation*.

<sup>4</sup>"The division of a whole nation into only two political parties must obviously be more or less unreal or arbitrary, since it would be absurd to suggest that there could ever be only two schools of thought in a nation. . . . The main reasons for this remarkable feature of British political life were two. In the first place, the electoral system, which divided the country into single-member constituencies, was hostile to the growth of numerous parties: if the system of proportional representation which Mill favoured had been introduced, this obstacle to the multiplication of parties would have disappeared. But the

check one another, preventing either from becoming too extreme, for each will, of course, be anxious to attract to its ranks as many as possible of the adherents of the other or at least to draw to itself the support of the "independents" who are not allied with either party. Such a desire is, of course, rendered futile by a party which assumes an ultra radical position upon pending political questions. The usual effect of a two-party system is, then, to cause the gap which separates their policies to be a comparatively narrow one, and thus, whichever party happens to be in control of the government, the policies which are adopted are not radically objectionable to any considerable portion of the people—not sufficiently so, at any rate, to drive them into the ranks of the irreconcilables.

Its  
advantages

When three or more definitely organized political

second reason was more fundamental. In the British system the main business of the House of Commons was to make and unmake governments, and to control and check their activities. As politicians could only hope to maintain a government with whose principles they agreed, or to displace a government of whose principles they disapproved, by helping to make a stable majority for that purpose in the House of Commons, it was obviously necessary that they should subordinate their differences on minor matters in order to attain success in their principal aim. It was the responsibility for creating and destroying governments which more than anything else kept the House of Commons, and therefore the country, divided into two main parties.

"One of the dangers of this system was that national interests might be subordinated to party needs. This danger also applies to a multiple-party system; and since men must always combine for common action in politics, the choice is not between party and no-party, but between two parties and many parties. It may indeed be said that the more highly organized a party is, and the more ancient and deep-rooted the loyalty of its members, the greater is the danger that the party interests may obscure national needs; and that therefore the system of multiple parties, easily formed and easily dissolved, may be a safeguard against this danger. Yet, on the other hand, it is probably true that the leaders of a great party, identified in the eyes of the nation with a long and honourable tradition, are less likely to go seriously astray than the leaders of an evanescent group, formed for the occasion of the moment. The risk that private or sectional interests may be given greater weight than national interests is indeed not peculiar to party government; it exists in all forms of government, and the only safeguard against it is a high standard of public rectitude. That depends upon causes too deep to be affected by any system of political machinery. Yet it may fairly be said that the two-party system is a real safeguard against a decline in the standard of public rectitude, just because that each party knows that its opponents are eternally on the outlook for means of discrediting it, and are certain to pillory and exaggerate any departure from accepted standards of which it may be guilty." Ramsay Muir, *National Self Government*, p. 158 ff. See also Muir, *Peers and Bureaucrats* (1910), and Low, *The Governance of England* (1914).



Multiple  
parties

parties exist, the tendency is to resort to "log-rolling," which means that one party or the other makes concessions to the smaller parties in order to obtain their support—concessions which are not based upon a conviction of the wisdom of the measures which they include. Thus it happens that a small third party including only a small percentage of the electorate may, by holding the balance of power between two larger parties, bring about the adoption by the government of policies which are opposed by a very large majority of the people. Thus is prevented, to this extent, the control of a true public opinion, or, to use Rousseau's term, of the "General Will."

Independent  
element  
desirable

The existence of a considerable number of independent voters who are not affiliated with any political party organization is a very different thing from the existence of a third party and is a condition to be desired in any popular government, if their independence is founded not upon an indifference to political questions or to a corrupt willingness to support any party which will give to them special favors or personal bribes, but is dictated by a determination not to give a blind and partisan adherence to any one party, irrespective of its methods or its policies. The body politic is in a healthy condition when there exists such a body of independent voters who hold the balance of power between two great political parties, for the result is that, in order to obtain their support, both parties will be compelled to make their policies as perfect and their methods as upright as possible.<sup>1</sup> It may, however, be said that

<sup>1</sup>Such a situation, however, has grave dangers. In single-member constituencies a small number of voters may hold the balance of power; they can control the election by ignoring other issues and casting their votes for or against a candidate who supports or opposes the interests which they deem paramount. The rapid spread of prohibition in the United States was in large measure due to these minority tactics. The American Federation of Labor has taken a leaf out of the book of the Anti-Saloon League and opposes the formation of any Labor Party. There is a shorter and more successful way of securing what they want, and Mr. Gompers professes to be satisfied with the results of the recent election. He maintains that fifty Congressmen who were hostile to Labor were defeated, while an equal number of candidates, "whose records show fair and considerate service," were elected. To be sure, Mr. Gom-



too widespread independence means a break up of the party system itself, and whether this is or is not an evil may depend upon particular conditions. The opinion may be ventured, however, that only under very exceptional circumstances is it possible to conduct any form of popular government without political parties through whose agency the will of the people can be educated, formulated, and made controlling upon the government.<sup>1</sup>

But also  
dangerous

It is an interesting fact that the growth of political party government has been a spontaneous development rather than a deliberately adopted policy, and that, until its characteristics were fully understood, its rise was viewed with a mistrust that has not wholly disappeared even at the present day. The indispensable prerequisite to the proper working of political parties is that the executive should be within the effective control of the public opinion as expressed at the polls or through the people's representatives in the legislature; and this explains why, as the Germans themselves admit, political parties have been so inefficient in Prussia and other German states. This is a point which is more fully discussed in the chapter dealing with the Prussian conception of constitutional monarchy.

Growth of  
parties  
spontaneous

pers was unable to deliver the labor vote to Governor Cox, just as in 1908 he failed when he endeavored to elect Mr. Bryan, but in both cases he sought to do the impossible, for the total vote is too great and so long as neither of the presidential candidates is openly hostile to trade union organizations, the members will refuse to vote *en bloc* at the behest of Mr. Gompers. They will be governed by their non-rational instincts rather than class feeling in the choice of a candidate. It is a different question, however, in a close congressional district. There, as we have said, a minority holding the balance of power is able to terrorize both candidates or to wreak vengeance on a member of Congress who is seeking reelection. The thing was done repeatedly by the Anti-Saloon League, both in state and in national politics, and there is no reason why labor cannot be equally successful. For this, among other reasons, the American Federation of Labor and Mr. Gompers oppose a separate labor party or the use of "direct action" for political purposes.

<sup>1</sup> "With an electorate numbered by tens of millions, a new peril has become manifest. In the highly developed newspaper press, playing incessantly on the minds of the electors with a stream of selected items of news, suggestively compiled descriptions of fact and deliberately persuasive incitements to this or that judgment or decision, the Party System has found at once a tool and a rival." S. and B. Webb, *A Constitution for the Socialist Commonwealth of Great Britain*, p. 80. See below, p. 219, note.

Switzerland  
and France

In Switzerland also, although political parties exist, they do not exercise the influence that they have in England or the United States, but the reason for this is not because of the independent status of the executive but because Switzerland, for special reasons, has been able to employ the direct democratic agencies of the initiative and referendum, and to carry on her government in large measure upon a non-partisan basis. In this she has been aided by her small size, her neutralized status, and especially by the fact that, fortunately, her citizen body is not made up of sharply defined social and commercial classes. France's multi-party system, as will be seen more in detail later, is partly responsible for the weak position of the ministries and their brief tenure of office.<sup>1</sup>

When, with the growth of popular government, political parties first made their appearance in England, they were viewed with distrust by the King and his advisers in Parliament. They appeared as discordant elements in the body politic and as making difficult the operation of parliamentary government as it then existed. There was, in fact, during the eighteenth and the early part of the nineteenth century not a little to justify this view, for it was not until the House of Commons obtained real control of the executive that an opportunity was offered for the proper functioning of political parties.

Origin of  
parties in  
England

The principle that the "King's advisers" should have the support of the House of Commons can be said to have been established in 1688 at the time of the "Glorious Revolution," but until about the time of the passage of the Great Reform Act of 1832 this meant, in practice, rather the getting of a Parliament that agreed with the Ministry than the appointment of a Ministry that had the confidence of the Commons. To secure the parliamentary support which it was necessary that the Ministry should have, it was considered proper to use force, fraud, and

<sup>1</sup>See Sait, *Government and Politics of France*, p. 86 ff.

bribery both in elections and in influencing the votes of the members of Parliament after they had taken their seats. As a matter of fact, due to the way in which the seats were territorially distributed and to the character of the suffrage qualifications, a very considerable proportion of the members of the House of Commons owed their seats to peers who sat in the House of Lords, and therefore voted as their patrons desired. But, in addition to this, special gifts in the way of appointments to office, of royal pensions and large outright gifts of money were employed in order to obtain the majority votes needed by the Ministry in power.<sup>1</sup>

Methods  
of control

The influence which the Government had in parliamentary elections is shown in the fact that whenever, during this period, it became necessary to choose a new House of Commons, a government majority was always returned. Thus Sir Erskine May, the English constitutional historian, writes as follows:

Before 1830 the confidence of the House of Commons, recognized since the revolution of 1688 as essential to the continued existence of a Ministry, almost invariably followed the choice of the Crown, whereas, since that date, the choice of the Crown has followed the direction given by the House of Commons. No instance can be cited before 1830 in which the king's ministers appealed in vain to the constituencies.

Parties and  
the Cabinet

The first instance, it is said, in which the Government resigned because of the adverse result of a general election was that of Sir Robert Peel's Ministry in 1834.<sup>2</sup>

As is well known, the Reform Act of 1832 made a territorial redistribution of seats, abolished many "rotten boroughs," and greatly broadened the suffrage. The result was, as May points out, to bring the Crown under the

<sup>1</sup>See *The Taint in Politics: A Study in the Evolution of Parliamentary Corruption*; E. Porritt, "Political Corruption in England," *North American Review*, Nov. 16, 1906; *The Unreformed House of Commons: Parliamentary Representation before 1832*.

<sup>2</sup>May, *Constitutional History of England* (Amer. ed.), Vol. I, p. 130, and Vol. II, p. 74 ff.



control of the House of Commons. It was not, however, until the Act of 1867—or even, it may be said, the Act of 1885—still further broadened the suffrage that the House of Commons came under the control of the electorate. After 1885 the Commons, as a body, was forced to take its orders from the electorate, or, still more recently, from the Ministry placed in power by the electorate.<sup>1</sup>

Non-party  
matters

In connection with party government in England it is interesting to note that during recent years there appears to be a growing tendency to remove certain matters, especially those relating to the army and navy and foreign affairs, outside of the arena of political party strife. And it may also be pointed out that the World War was conducted by a coalition cabinet in which the several political parties were represented with an understanding that, so far as the waging of the great struggle was concerned, party differences should be buried.

Original  
theories in  
America

Eighteenth-century English opinion with regard to political parties was carried over to America, and our present federal and state governments were framed under its influence. The theory then was that the people were to exercise their wills through the individual wills of the representatives whom they should individually elect, and security against possible oppression at the hands of those thus entrusted with political authority was to be found in a system of constitutional checks and balances. Thus throughout the series of papers collectively known as *The Federalist*, in which the nature of the proposed Federal Constitution was expounded and its adoption urged, repeated warnings against the development of parties and party spirit abound,<sup>2</sup> and this same doctrine constitutes

<sup>1</sup>J. H. Rose, *The Rise of Democracy*; Cooke, *History of Party from the Rise of the Whig and Tory Factions in the Reign of Charles II to the Passing of the Reform Bill*; G. L. Dickinson, *The Development of Parliament during the Nineteenth Century*.

<sup>2</sup>The framers of the Constitution attempted to provide a government which would not be harassed by the "violence of faction." Madison called attention to



one of the principal themes of Washington's Farewell Address. Thus, after referring to the evils of parties founded on geographical distinctions, Washington says:

Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the spirit of party generally. . . . It exists under different shapes in all governments, more or less stifled, controlled or repressed; but in those of the popular form it is seen in its greatest rankness, and is truly their worst enemy . . . it serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another, foment occasionally riot and insurrection. It opens the doors to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passions. . . . There is an opinion that parties in free countries are useful checks upon the administration of the government and serve to keep alive the spirit of liberty. This, within certain limits, is probably true; and in governments of a monarchical cast, patriotism may look with indulgence, if not with favor, upon the spirit of party. But in those of the popular character, in governments purely elective, it is a spirit not to be encouraged.

Washington's advice

A critical examination of the Federal Constitution as well as of the first constitutions of the states shows clearly no expectation that political parties would arise and government be carried on through them. The theory of popular government held at this time was the very simple one that the people should select representatives who should be not merely agents acting under instructions to carry out the wishes of their constituents, but representatives in whose probity and judgment the people had confidence and who were therefore authorized to exercise an independent judgment upon matters of public policy. Further-

No constitutional provision for parties

the fact that "a zeal for different opinion" had "divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good." *The Federalist*, No. X. As a matter of fact, political parties were already in existence at the time the Constitutional Convention met; one school of opinion wished to give large powers to the Federal Government, and the other wished to preserve the rights of the states.

more, these representatives, thus vested with full powers, though meeting together for discussion and coöperation and for action in accordance with a majority vote, were to vote irrespective of party affiliations. Each representative was to be a channel through which the interests and the public opinion of his particular constituency might be made known, and thus the legislative body as a whole furnished with information; but the Congress was to be a national body, and not a mere aggregate of representatives of special districts, and each member, when once elected, was to be at once transmuted from a local into a national agent.

Which  
grew up  
extra-  
legally

It is not necessary to say that this theory was never realized. Almost at once political parties arose and made their partisan influence felt in the legislative halls and in the other departments of the federal service, and these political parties soon constructed for themselves elaborate governmental machineries through which to operate. As we now look back upon what so spontaneously and promptly occurred, we can see that it was, after all, what might have been expected.<sup>1</sup>

Parties and  
"Separation  
of Powers"  
Theory

The most noteworthy characteristic of constitutional government in the United States is the extent to which the doctrine of the "separation of powers" is applied. This has resulted not simply in the creation of an independent judiciary, but a severance in their actual operation of the executive and legislative branches of government. Reference is here had not only to the federal but to the state governments and even, in considerable measure, to the city governments. The result has been that, if popular

<sup>1</sup>Bryce, *The American Commonwealth* (Vol. II, Part III) still contains the best discussion of political parties in the United States. Of interest also are Morse, *History of Political Parties in the United States*; Jesse Macy, *Party Organization and Machinery*; P. O. Ray, *Political Parties and Practical Politics*; J. A. Woodburn, *Political Parties and Party Problems*; F. E. Haynes, *Third-Party Movements in the United States*; F. J. Goodnow, *Politics and Administration*; F. W. Dallinger, *Nominations for Elective Office in the United States*; A. N. Holcombe, *State Government in the United States*, Chap. VII.

rule was to succeed, there had to be created some means whereby the electorate should be able to control both the executive and the legislature and thus to bring them into a working relation to one another. This end could be secured only by making them both subject to the influence and control of a single body—the organized body of voters, constituting the majority of the electorate, who could dictate the policies and, at the elections, determine the persons who should sit in the legislatures or occupy the seats of executive power. Thus, and thus only, was there a reasonable guarantee afforded that the majority voice of the people should have its way; for thus its policies, when enacted into law, would be enforced by elected officials who were in sympathy with those policies.<sup>1</sup> It has of course frequently happened that the same political party has not succeeded in electing its executive as well as its legislative candidates and, when this has occurred, an unfortunate deadlock has existed. The same situation has been produced when the two houses of the legislature have been of different political complexions. The result has been in these cases that neither political party has been able to carry into effect its legislative programme, and this is a defect inherent in the American system of government which the development of party organizations has not been able to correct. Its possible evils have, however, been much reduced by a willingness upon the part of both

Disunion of  
Executive  
and Legis-  
lature

<sup>1</sup>The classic discussion of the extra-constitutional position of parties in the United States, and their utility in connection with the separation of powers theory is H. J. Ford, *The Rise and Growth of American Politics*. There is also a very interesting essay in A. C. McLaughlin, *The Courts, the Constitution and Parties*. The problem was clearly put by President Wilson in his *Constitutional Government in the United States* (1908). "Only in the United States," he wrote, "is party thus a distinct authority outside the formal government, expressing its purpose through its own separate and peculiar organs, and permitted to dictate what Congress shall undertake and the national administration address itself to. Under every other system of government which is representative in character and which attempts to adjust the action of government to the wishes and interests of the people, the organization of parties is, in a sense, indistinguishable from the organs of the government itself." (p. 211). Cf. his *Congressional Government* and C. S. Thompson, *The Rise and Fall of the Congressional Caucus*.



sides to make concessions and thus to make tolerable a condition that, without such reasonable-mindedness, would mean a great inefficiency if not a total breakdown of government.

In earlier chapters it has been pointed out that one of the ways in which the problem of constitutional government may be stated is that responsibility must be attached to political power.<sup>1</sup> The problem of popular government may be similarly stated to be the placing in authority, by the people, of representatives who will be able to give effect to the general will, and who may be held responsible for the manner in which they execute this mandate. Now it is clear that these ends are defeated if the elected agents of the people are not able to carry into execution the policies for which the party stands which has elected them. But even if in a majority in the legislative chambers these representatives cannot carry out the general orders which they have received, or the promises which they have made unless they are able to act practically as a unit, and thus justification is furnished for those rules of legislative procedure such as prevail in the federal House of Representatives which make it possible for the party in power to overcome the resistance of those in the minority, to control the time for debate, to determine what measures shall be discussed, what amendments may be made to them, and when the final vote upon them shall be taken. The exercise of these powers by the majority party in the legislature is often denounced as tyrannous, and when misused it is tyrannous, but when employed with moderation and fairness, it is not open to criticism, for it is obviously reasonable that a party when placed by the people in charge of the government, should be enabled to carry into

Majority  
must be  
free

To override  
the minority

<sup>1</sup>For a convenient summary of legislation regulating parties, see Beard, *American Government and Politics*, Chap. XXX. Provisions of election laws and corrupt practices acts are given in Ray, *Political Parties and Practical Politics*, and in the periodical summaries which appear in the *American Political Science Review* and the *American Year Book*. See also Senate Document No. 86, 59th Congress, 1st Session.



effect the policies which the people by their votes have approved. If popular government does not mean this it means nothing at all.

It is further to be observed that the equipping of a majority party with adequate power to impose its will upon a resisting minority makes for practical responsibility, for it thus becomes impossible for the party in power to excuse a failure to carry out the campaign promises which it may have made upon the ground that, because of "legislative obstruction," it was not able to secure the necessary legislation.

The absolute necessity that a legislative majority should be able to enforce its will is shown by the fact that when, in 1910, there was a successful revolt in the House of Representatives against the so-called tyranny of the rules of procedure which the Republicans, under the leadership of Speaker Cannon, had been enforcing, the changes that were made still left the controlling power in the hands of the majority and, indeed, scarcely lessened its dominating force. Political leadership in the House was, in considerable measure, shifted from the Speaker to the Chairman of the Committee on Ways and Means, and the powerful Committee on Rules was increased in membership from five to ten, and the Speaker made ineligible to appointment upon it; but its powers were not reduced and the only effect of its increase in size was to make it necessary for the party in power to see to it that six instead of three of the committee members should be selected from its own ranks.

The agency through which the party members have been able to make full use of their numbers has been the Caucus. This is a meeting held by each party in order to determine what its action, as a party, shall be upon the legislative floors. It does not need to be said that each party holds its caucuses separately from the other's. The caucuses are organized meetings with definite memberships,

Otherwise  
responsi-  
bility is  
impossible

The Con-  
gressional  
Caucus

with officers of their own selection and operating under established rules of procedure. They often meet in the legislative chambers, at times when the legislature itself is not sitting and, as deliberative bodies, they are distinguished from the legislature chiefly by the fact that in each of them only the members of one political party are present, and, indeed, only of those members of the party who have pledged themselves in advance to be guided upon the legislative floors by the decisions which may be made by the caucus.<sup>1</sup>

In a later chapter dealing with the American system of "congressional government," we shall have more to say of the manner in which the caucus operates.

#### TOPICS FOR FURTHER INVESTIGATION

Third-Party Movements.—Bryce, *The American Commonwealth*; Humphrey, *History of Labour Representation*; Bryce, *Modern Democracies*; Haynes, *Third-Party Movements*.

The Merits and Defects of a Two-Party System.—Sait, *Government and Politics of France*; Ogg, *The Governments of Europe*; Bryce, *Modern Democracies*.

Attacks on the Party System.—For references, see above, pp. 128, 131.

Governmental Control of Parties.—Beard, *American Government and Politics*; Bryce, *The American Commonwealth*; Lowell, *The Government of England*; Kales, *Unpopular Government in the United States*.

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<sup>1</sup> See C. S. Thompson, *The Rise and Fall of the Congressional Caucus*, and below, Chapter XIX.

## CHAPTER IX

### REPRESENTATIVE GOVERNMENT

THE term Democratic Government, as has been said, is frequently used as synonymous with Popular Government, and we therefore often hear a government spoken of as more or less democratic according to the extent to which the will of the governed is decisive in controlling its policies and their execution.<sup>1</sup> Strictly speaking, however, a government may be termed a democracy only when the privilege is granted to practically the entire adult population to decide by their united voices the policies of the State.<sup>2</sup> This they can do by assembling in one place and there discussing possible alternatives and reaching decisions by *viva-voce* voting; or, without assembling in one place, by casting ballots, as is done where legislative measures are "initiated" or passed upon by referendal votes of the people. In these cases the people, or rather the electorate, act directly and not through selected representatives; and, in order to be more specific, this form of political rule is often spoken of as "pure" or "direct" democracy.

Pure  
Democracy

Direct  
Democracy

<sup>1</sup>"I use 'democracy' here, in its modern sense, to mean 'a government in which every one has a share.' That every one should have a share in government is represented as following from the fact that every one has an interest in good government; and if it is argued that some people are not wise enough to understand even their own interest, much less that of the whole state, the answer is: 'The other plan has been tried long enough, and it has been found that each man practically understands his own interest well enough, and that those who profess to be better than others and to be ready to undertake the tutelage of others invariably in the long run betray the trust.' An aristocracy, like Bolingbroke's patriot King, is an empty imagination; in practice it is merely an oligarchy." Seeley, *Introduction to Political Science*, p. 324.

<sup>2</sup>On the admission of women to the electorate, see Story, *Commentaries*, Vol. I, sec. 579; Dicey, *Letters to a Friend on Votes for Women*; Mill, *Representative Government*; H. St. G. Tucker, *Woman's Suffrage by Constitutional Amendment*; and Dicey, *The Law of the Constitution* (1915 ed.), p. lxii.

Greece and  
Rome

Pure or direct democracy plays and must play an unimportant part in modern political life. To what extent it figured in early times among the Teutonic tribes is a matter of dispute among historians. Among the Greeks and the Romans, until imperial times, every full citizen had the right of active citizenship. That is to say, he might directly exercise a deciding vote in his Gens or Tribe or Comitia. But, in the first place, only comparatively few of the subjects of republican Rome<sup>1</sup> or of the Greek State<sup>2</sup> possessed the full rights of citizenship; and, in the second place, there was the doctrine of the City State.<sup>3</sup> One had political rights only as a citizen of Rome or Athens or Sparta, to which city he had to go in order to exercise them. And thus in only a very qualified sense can these classical States be called pure democracies. At the present time we have no important States organized upon a directly democratic basis. When asked for instances of pure democracies we can only point to the functions of the New England Town Meeting<sup>4</sup> and to the six *Landsgemeinden* which still exist in the Swiss cantons. Even in these *Landsgemeinden* most of the business which is transacted is carefully prepared beforehand, and only in two of them may amendments be offered to the proposals thus prepared and submitted. Furthermore, in one of the cantons the size of the assembly has made it necessary to forbid all debate. These directly democratic gatherings meet but once a year.<sup>5</sup>

New Eng-  
land and  
Switzer-  
land

<sup>1</sup>Bryce, *Modern Democracies*, Vol. I, Chap. XVI.

<sup>2</sup>Zimmern, *The Greek Commonwealth*, p. 170. It is estimated that the 35,000 inhabitants who were completely free managed the State. There were 100,000 slaves.

<sup>3</sup>Warde Fowler, *City State of the Greeks and Romans*.

<sup>4</sup>"There is a common feeling that the town meeting is a small affair compared with the Swiss *Landsgemeinde*. It has not the sovereign power, but it is not by any means always smaller. The town of Brookline in Massachusetts, for example, has several times the population of the largest Swiss canton that still allows amendment and debate at its *Landsgemeinde*." Lowell, *Public Opinion and Popular Government*, p. 152n.

<sup>5</sup>"The eulogy of the *Landsgemeinde* is justified, but, even in its present form it has its weaknesses and disadvantages, like every political institution. Obvi-



That direct democracy should be so little in evidence in the modern world requires no explanation, for it is clear that, as a practical proposition, it cannot be operated in any State of considerable size which grants rights of active citizenship to the major portion of its adult population.<sup>1</sup> Rousseau, the arch-exponent of the doctrine that to everyone belongs the ethical right to refuse obedience to a government or to laws to which he has not himself pledged his obedience, recognized the practical impossibility of direct democracy except in very small political communities. He said:

If we take the term in the strictest sense, there never has been a real democracy, and there never will be. It is against the natural order for the many to govern and the few to be governed. It is unimaginable that the people should remain continually assembled to devote their time to public affairs. . . . Besides, how many conditions that are difficult to unite does such a government presuppose. First, a very small State, where the

Rousseau's  
theories

ously it cannot succeed except in small areas, and there only provided a certain unity is attained. Regional and political differences pushed to the extreme formed the rock upon which that of Schwyz came to grief. Its success depends in a very great measure upon the political skill and high character of those who direct it. They must know how to manipulate these extremely susceptible assemblies, how to deal with would-be demagogues and how to steer them into the right path without their suspecting it. If it is more or less true that this amounts to government by a few men forming a kind of aristocracy, the same might be said of almost all political systems. Necessarily, the collective will is in the last analysis the resultant of a number of individual wills which it influences or determines more or less strongly. The *Landsgemeinden* are reproached for a tendency towards political and religious intolerance, and for going out of their way to obstruct the path of progress. But here a distinction must be made. The *Landsgemeinden* of Catholic cantons, the mountainous or agricultural regions, are generally inspired by a spirit of conservatism and loyalty to tradition, which has frequently given justification for this criticism. The case is different with the *Landsgemeinden* of the Protestant and industrial cantons, Glarus and Appenzell-Ausserrhoden. These cantons have contrived to follow a progressive policy and work out satisfactory solutions of the complicated problems presented by modern life in industrial districts, and have demonstrated that the institution of the *Landsgemeinden* is entirely compatible with the requirements of the age." Bonjour, *Real Democracy in Operation*, p. 57. The whole discussion (Chap. III) is important. See also, Ogg, *The Governments of Europe* (rev. ed.), p. 575; Vincent, *Government in Switzerland*, Chap. III, and Brooks, *Government and Parties of Switzerland*, Chap. XVII.

<sup>1</sup> See Mallock, *The Limits of Pure Democracy*, for a very conservative statement. Of interest also are Bryce, *Modern Democracies*, Vol. I, Part I, and Hearnshaw, *Democracy at the Crossways*, Chap. I.

people can readily be got together and where each citizen can know all the rest; secondly, great simplicity of manners, to prevent business from multiplying and raising thorny problems; next, a large amount of equality in rank and fortune, without which equality of rights and authority cannot long subsist; lastly, little or no luxury.

And he later adds:

Tendency  
to change

There is no government so subject to civil wars and intestine agitations as democratic or popular government, because there is none which has so strong and continual a tendency to change to another form, or which demands more vigilance and courage for its maintenance as it is. . . . Were there a people of gods their government would be democratic. So perfect a government is not for men.<sup>1</sup>

As a substitute for democracy, or as the nearest possible approach to it, there has been developed in comparatively modern times what is known as Republican or Representative Government, under which the right is granted to a certain portion of the adult citizens to vote for a smaller body of men to act as their representatives for the formulation of public policies.<sup>2</sup> To this same electorate is granted the authority to select by their votes or through their representatives those chief executive officials who are to carry these public policies into execution.

Judge Cooley, one of the most eminent of American constitutional jurists, defines a republican government as follows:

Republican  
Government

By republican government is understood a government by representatives chosen by the people, and it contrasts on one side with a democracy, in which the people or community as an organized whole wield sovereign powers of government, and on the other with the rule of one man, as king, emperor, czar or sultan, or with that of one class of men, as an aristocracy. In strictness, a republican government is by no means inconsistent with monarchical forms, for a king may be merely an hereditary or elective executive, while the powers of legislation are left exclusively to a representative body freely chosen by the people.

<sup>1</sup> *Social Contract*, Book III, Chap. IV.

<sup>2</sup> Except in so far as the electorate may have reserved the right, through the initiative or referendum, to participate directly in the enactment of laws.

It is to be observed, however, that it is a republican form of government that is to be guaranteed; and in the light of the undoubted fact that by the Revolution it was expected and intended to throw off monarchical and aristocratic forms, there can be no question but that, by a republican form of government was intended a government in which not only would the people's representatives make the laws, and their agents administer them, but the people would also, directly or indirectly, choose the executive. But it would by no means follow that the whole body of the people, or even the whole body of adult or competent persons, would be admitted to political privileges; and in any republican State, the law must determine the qualifications for admission to the elective franchise.<sup>1</sup>

A satisfactory definition of a republican government is of special importance in the United States, for the Federal Constitution declares that a republican form of government shall be guaranteed to the member states. Though stated as an obligation imposed upon the national government, this clause has been construed to operate as an imperative mandate upon the states that they shall not in their governmental organizations depart from this type, and, indeed, some constitutional lawyers contend that the attempt upon the part of a state to introduce the referendum as to state-wide laws violates this requirement, in that it tends to substitute direct democratic for indirect representative control of the government.<sup>2</sup> Within the

Guaranteed  
to the  
American  
States

<sup>1</sup>*Principles of Constitutional Government*, Chap. XI. "A representative government is when a certain portion of the community, generally consisting either of all the adult males, or of part of them, determined according to some qualification of property, residence, or other accident, have the right of voting at certain intervals of time for the election of particular members of the sovereign legislative body. This right of voting is properly a political right; nor does it bear any resemblance to the exercise of sovereignty. The possession of this right enables a voter to influence the formation of the sovereign body; but a voter never has any part of the governing power, nor does he wield a power which in any way resembles the authority of government, except that the decision of those who really wield that authority may be influenced by his vote." Lewis, *The Use, and Abuse of Political Terms*, p. 107.

"We mean by representative government one in which the body of the people either in whole or in a considerable proportion of the whole, elect their deputies to a chamber of their own." Brougham, *The British Constitution*, p. 89.

<sup>2</sup>The Supreme Court of the United States has held that the determination of whether a state has a "republican" form of government is a political question, to be settled by the political branch of the government. Congress tacitly



definition of republican government which Judge Cooley has given us and which has been widely approved, there is a wide variety of governmental structure constitutionally open to adoption by the states.

Popular  
election

It will be seen that, according to the definition which has been given, the essential characteristics of a government republican in form are that the legislative body is composed of members elected by the people, and that the chief executive is elected either by these representatives or directly by the electorate.

Population  
and elec-  
torate

Two facts are to be noted with regard to this definition. In the first place, it does not fix the proportion of the entire citizen body to which the right of suffrage shall be granted, nor the character of the conditions upon which this right shall be based. In the second place the characteristics which have been stated apply to the form of the government and not to the actual results that may be reached under it.

As regards the size of the electorate it would seem to be established as a proposition not only of United States constitutional law but of public law in general that, provided the representatives when elected are deemed to represent and act for the whole people, it is not inconsistent with the idea of a republican government that the electorate should include but a minority of the adult male population. Whether this could be carried to such an extreme as to vest the right of voting in, say, but one man in a thousand,

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decides the question by admitting senators and representatives. "No particular form of government is designated as republican. . . . All the states had governments when the constitution was adopted. . . . These governments the constitution did not change. . . . Thus we have unmistakable evidence of what was republican in form within the meaning of the term as employed by the constitution." *Minor v. Happersett*, 21 Wallace 162 (1875). See also, *Luther v. Borden*, 7 Howard I (1849) and *Pacific Telephone and Telegraph Co. v. Oregon*, 223 U. S. 118 (1912).

Congress required New Mexico and Arizona to amend their constitutions when they sought admission to the Union in 1911. The latter state obeyed, was admitted, and then reinserted the provision (which had been objected to) for the recall of judges. See Taft, *Popular Government: Its Essence, its Permanence, and its Perils*.



without destroying the representative or republican character of the government it is difficult to say; but that the voters may number only a small minority without having this result is certain.

In fact, until very recently, in all the governments of the world described as republican or representative in character, the suffrage has been extended to but a small proportion of the entire people.<sup>1</sup> Even when the right to vote is granted to every adult male, not more than about 20 per cent. of the citizen body has been included in the electorate; and the inclusion of all adult females does not prevent a minority of the population from exercising the rights of active citizenship.

Although a limited suffrage is consistent with the conception of a republican or representative government it may perhaps be justly doubted whether a government is republican in form when the right to vote is based upon personal attributes or characteristics which have no reasonable relation to a presumed ability upon the part of a voter to exercise his right in an intelligent, upright, and public-spirited manner. It has already been said that, under a republican form of government, those who are elected are supposed to represent the whole people, even though chosen by a limited electorate. This supposition becomes a violent one if the suffrage is based upon purely artificial class distinctions. The possession of a certain amount of wealth might seem to be an artificial basis for the suffrage. It has, however, been held that the possession of property not only gives to its owner a more real interest in the welfare of the country but raises at least the presumption that he has a better judgment with regard to public policies than the propertyless man may be supposed, upon an average, to possess.

It has been said that the term Republic applies to the

Representative Government and limited suffrage

Property qualifications

<sup>1</sup> Seymour and Frary, *How the World Votes* (1918); Porter, *History of Suffrage in the United States*; Garner, *Introduction to Political Science*, Chap. XV.

Question of  
form rather  
than results

form of a government rather than to the results reached under it. This means that it is possible, under a republican form, for the actual political influence and power to be exercised by a comparatively few persons who may or may not hold office, and who may or may not employ their power for the public good. This possible result is made evident when we study the operations of political parties in the United States and elsewhere. So, also, under a republican form of government the law may be so loosely enforced that the individual's rights of life, liberty, and property are in constant jeopardy; or the laws themselves may be so stringent as to leave to him little personal liberty. It is an unfortunate fact that corruption and inefficiency and injustice seem to find almost as full opportunities under democratic or representative institutions as they do under more autocratic forms; and, as has often been said, there is no tyranny so dangerous and so oppressive as that of a multitude.<sup>1</sup> Indeed, a recognition of this fact, in the United States and in other governments subject to the control of public opinion, has led to the deliberate adoption of a great variety of constitutional devices whereby the people or their representatives have their public actions checked and hindered. This is one of the purposes, for example, of providing two houses rather than one house of the legislature, and of seeking to make one of these chambers especially conservative in character. Of similar purpose is the granting of an absolute or suspensive veto to the executive, of providing special quorums or specially large votes for certain measures, of the compul-

Checks on  
representa-  
tives

<sup>1</sup>A recent writer, who takes some flings at democracy, lists among his dangers the possibility of vexatious and inquisitive tyranny. The other counts in the indictment are weakness, timidity, inability to bring the best men to the top, likelihood of victimization by shibboleths and catchwords, conservatism and obstructiveness, rash iconoclasm, and corruption. "The corruption of democracies proceeds directly from the fact that one class imposes the taxes and another class pays them." This last remark of the clerical critic may be interpreted in exactly the opposite way from which he intends it and with probably as much truth. The whole discussion is rather illuminating. Dean Inge, "Our Present Discontents," *Outspoken Essays* (1919).

sory referendum, and of enumerating in written constitutions a great number of matters regarding which the legislature may not legislate at all or only in a certain manner or under certain conditions.

In the United States it has been several times affirmed by the Supreme Court that the guarantee of the Federal Constitution as to republican governments in the states applies only to their form and not to their substantive results.

It has been seen that a Republic, contrasted with a Pure or Direct Democracy, is a government in which those who exercise the policy-forming functions—the Chief Executive and the Legislature—are selected by the people and are deemed to act as their representatives. This representative principle also finds a place, but not so dominant a one, in other forms of constitutional government. Thus, in such strong monarchical countries as Prussia and Russia (before the war), Japan, Turkey, and Persia, provision has been made for a branch of the legislature composed of members elected by the people to make known and express their interests and wills. In these monarchical countries, however, it is to be noted that not only is a decisive legislative power denied to the representative bodies but they are regarded as representing not the entire citizen body of the State but only a single part of that body, that is, the untitled, unprivileged, less wealthy generality of the body politic. Other classes find their representation in the Upper House of the legislature, or in the executive.

In the German Empire the members of the *Reichstag* were elected by what was practically a manhood suffrage of the entire German people. In an important sense, however, this popularly elected body was intended and, in fact, served to represent a single element in the Imperial Government. It was not the real policy-forming organ of the Empire.

In the establishment of the Empire there were two im-

By  
constitutional  
provision

Representa-  
tive prin-  
ciple and  
monarchies



The  
German  
Empire

portant factors, the coöperation of which had to be obtained. In the first place there was the rising feeling of common German nationality, which statesmen like Bismarck were wise enough to seize upon in order to found upon it a powerful Teutonic unity under the hegemony of Prussia. Thus, in 1866, when Prussia pronounced the old *Deutscher Bund* dissolved, the King declared that he did not regard as destroyed the national foundation upon which the Confederation had been built; and the manifesto which was to have been distributed by the Prussian troops in whatever German States they might enter contained the statement that "only the basis of the Confederation is left, the living unity of the German Nation, and it is the duty of the governments and the people to find for this unity a new and vigorous expression."

The *Reichstag* was the organ through which this important factor in the development of German unity found expression.<sup>1</sup> Another and still more powerful factor in this great movement was composed of the "governments" of the confederating states—their monarchs and advisers, who, within their respective states, held the decisive political power. These were in truth the active agents through which the union of the several sovereignties was brought about, and there was no disposition whatever upon their part to establish an empire in which their collective authority should not be so controlling as, individually, it was in the separate states. To satisfy this requirement and to provide an organ in which the "governments" or rulers of the several states might find representation and authority as such, the *Bundesrath* was provided. This is

Powers  
of *Bundes-  
rath*

<sup>1</sup>"The idea of a national system of representation was embodied in the French constitution of 1791, which declared that the deputy should not be the representative of any particular department, but of the entire nation and that no instructions should be given him. This principle is expressly asserted in the constitution of the German Empire, which declares that members of the *Reichstag* are representatives of the whole people and are not bound by propositions and instructions. It is also embodied in the present electoral law of France, in the electoral law of Austria, and in the constitution of the Swiss Confederation." Garner, *Introduction to Political Science*, p. 479.



shown by its composition, powers and modes of procedure. It was made up of delegates appointed by each government as it saw fit; and these delegates acted strictly according to the instructions received from those who appointed them. Meetings of the *Bundesrath* were secret, and each state had a definitely fixed voting strength irrespective of the number of delegates it chose to send. And, as is elsewhere shown, the *Bundesrath* initiated all important legislative proposals and reserved to itself the right to pass finally upon all matters which received the approval of the *Reichstag*. Other characteristic monarchical powers also were vested in the *Bundesrath*.

Representa-  
tion by states

It is thus seen that although popularly elected, only in a very qualified sense can it be said that in the German Empire the *Reichstag* was the representative organ of the entire body politic. It is more nearly correct to say that the Imperial body politic was made up of two classes of persons—the people as a whole, and the twenty-odd “governments” of the states—the *Reichstag* representing the one and the *Bundesrath* the other.

In England, until comparatively recent times, the House of Commons represented a class rather than the entire body politic.<sup>1</sup> Until the suffrage was successively widened in 1832, 1867, 1885, and 1918, the Lower House in fact represented only a portion of the Commons, although the theory was that it “virtually” represented all the people of Great Britain who did not find special representation in the House of Lords.<sup>2</sup>

Commons  
and Lords  
in England

<sup>1</sup>See Dickinson, *The Development of Parliament during the Nineteenth Century*.

<sup>2</sup>Morris, *Parliamentary Franchise Reform in England from 1832 to 1918* (Columbia University Studies, Vol. XCVI).

It is a remarkable fact that the Representation of the People Act (1918) passed the Commons with practically no opposition. The promise was made that during the war there would be no controversial legislation, but there were few protests when Parliament proceeded to exact a measure which in time of peace would have been vehemently denounced. Its details were very largely determined in a secret conference presided over by Mr. Speaker; a general election being inadvisable with so many voters out of the country, there was no suggestion that the House of Commons should secure a fresh mandate before sanctioning a constitutional change as great as these in 1832, 1867, and 1885 when feeling

The Parlia-  
ment Act

However, the House of Commons has increased its power at the expense of the King and of the House of Lords until, since the Parliament Act of 1911, the Lords have only a suspensive, or advisory, veto. The principle has thus become established that in the House of Commons the entire nation finds itself represented, and it is, of course, only upon this supposition that the House feels itself, and is generally recognized to have, the determining voice in all matters of public policy.<sup>1</sup>

Growth of  
Democracy

A survey of political developments in other countries in which the commoners have been viewed as constituting but one class in the body politic and, because of this, their representatives given only a partial voice in the control of the State, would seem to indicate that, with the advance of popular education and the spread of political self-consciousness among the mass of the people, there is an almost irresistible pressure exerted upon those in political authority to concede to the popularly elected branch of the legislature a more than advisory, criticizing, and participating voice in the determination of the contents of the law, and to recognize the people's representatives as the real, responsible, and determining organ of government.<sup>2</sup>

In France, when the representatives of the *Tiers État* were summoned in 1789, it was with the idea that they would sit as a separate body and as the mouthpiece of a

was very high. Wealth and privilege either declined to appear as the enemy of a political reform which they knew to be inevitable or hesitated to oppose the Government while it was conducting a war. "When the real history of this wonderful war is written," remarks a recent writer, "methinks the historian will reckon among its most amazing features the fact that it so absorbed the mind of the nation as to make possible a silent revolution." G. W. E. Russell, *Prime Ministers and Others*, p. 246 (1918).

<sup>1</sup>For a statement of the dangers of this situation see Belloc, *The House of Commons and Monarchy*, a volume which makes the most of half-truths.

<sup>2</sup>"In the early nineteenth century, the democratic form of government was practically confined to a few communities on the eastern shores of the United States. In the early twentieth century, more than fifty countries, containing in all more than a quarter of the population of the globe, possess constitutional governments, in which taxation and legislation are controlled by the people or their representatives." Jethro Brown, *The Underlying Principles of Modern Legislation*, p. 314. See also, Fisher, *The Republican Tradition in Europe*.

single class—the *bourgeoisie*. It was, indeed, as is well known, only dire financial need which led to the asking of their wishes at all. The decisive revolutionary step was taken, however, when that body declared in the famous proclamation of August 26, 1789, that it considered itself as a body representing the entire and inherently sovereign people of France, and, as such, endowed with full constitution-making powers, and, therefore, that it might validly determine what form of government should be maintained and who should be permitted to administer it.<sup>1</sup> Thus was declared the principle since known in French constitutional jurisprudence as *Souveraineté Nationale*. Its theoretical justification was, of course, based upon the reasoning of Rousseau's famous tractate *Le Contrat Social*, first published in 1762. This principle, though it does not find statement in the "Fundamental Laws" which now serve as a written constitution for the French Republic, is still recognized in France as furnishing the ethical and legal basis of all government; and, in conformity with it, the parliament, composed of two chambers (both elective), is deemed the organ through which the will of the State and of the French people finds authentic expression.<sup>2</sup>

Though elected by constituencies within specified territorial areas—the deputies by direct election and the senators by indirect election, that is, by specially constituted electoral colleges in the Departments—all members of parliament are deemed, in principle at least, when elected, to act as representatives of the entire French nation. It is therefore held improper that the several constituencies should attempt to dictate by binding instructions how the persons whom they elect should vote after they have taken their seats in parliament. For it is clear that if this were permitted these parliamen-

The French  
Revolution

Represent-  
ative prin-  
ciple in  
France

<sup>1</sup>See Burns, *Political Ideals*; Robinson, "The French Declaration of the Rights of Man," *Political Science Quarterly*, December, 1899.

<sup>2</sup>Sait, *Government and Politics of France*, Chap. I.



tarians would, to this extent, represent, not the French people as a whole but only certain geographical groups of them. The same reasoning of course holds true in other truly republican countries such as the United States, as well as in England, where, as has been seen, the House of Commons is regarded as representing the entire citizen body.

It does not need to be said that in the United States the doctrine of popular sovereignty is also accepted, and that, therefore, it is held that the only ethically valid government is one in and through which the will of the people, considered as a political whole, finds expression and enforcement. Neither in the legislatures of the individual states nor in the National Congress are there classes of the population represented as such. It is true, however, that the United States Senate until very recently was composed of senators elected from each state by the legislature thereof, and, because of this and of the further fact that each state, irrespective of its size and population, is equally represented by two senators, it has been generally said that in the Senate the states are represented as such, and not as parts of an indivisible national whole.

Since the Seventeenth Amendment to the Federal Constitution was adopted, the senators have been elected, like the members of the House of Representatives, by the popular vote, but even before this the senators in Congress occupied a position that was in no way similar to that of the delegates which are sent to the *Bundesrath* by the several governments of the German Empire.

It is true that, as regards the maintenance of certain reserved rights of the states, the senators are supposed to be especially solicitous, but they have, almost without exception, regarded themselves as unrestrained by any mandates that their respective state legislatures have occasionally sought to give them. Upon the contrary, they have held themselves obligated to vote according to

Popular  
sovereignty  
in the U. S.

The  
American  
Congress



their conceptions of national, as opposed to purely local, interests. And it is to be further observed that, even when elected by the legislatures of the states, they were indirectly the representatives of the people who had elected the legislatures.

National  
and local  
interests

Until 1913 the United States Constitution contained the provision that "The Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof, for six years; and each senator shall have one vote."<sup>1</sup>

By the Seventeenth Amendment to the Constitution, which went into force May 31, 1913, there was substituted the following provision:

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

It is thus provided that the senators shall be elected by exactly the same body of electors as are the members of the Lower House of the Congress. Therefore, all that now distinguishes the Senate from the House of Representatives is that each state, irrespective of size and population,

Popular  
Election of  
U. S.  
Senators

<sup>1</sup>"The Senate is just what the mode of its election and the condition of public life in this country make it. Its members are chosen from the ranks of active politicians, in accordance with a law of natural selection to which the State Legislatures are commonly obedient; and it is probable that it contains, consequently, the best men that our system calls into politics. If these best men are not good, it is because our system of government fails to attract better men by its prizes, not because the country affords or could afford no finer material. The Senate is in fact, of course, nothing more than a part, though a considerable part, of the public service; and if the general conditions of that service be such as to starve statesmen and foster demagogues, the Senate itself will be full of the latter kind, simply because there are no others available. There cannot be a separate breed of public men reared especially for the Senate. It must be recruited from the lower branches of the representative system, of which it is only the topmost part. No stream can be purer than its source. The Senate can have in it no better men than the best men of the House of Representatives; and if the House of Representatives attracts to itself only inferior talent, the Senate must put up with the same sort. Thus the Senate, though it may not be as good as could be wished, is as good as it can be under the circumstances. It contains the most perfect product of our politics, whatever that product may be." Woodrow Wilson, *Congressional Government*, pp. 194-5.

has an equal representation in the Senate, whereas representatives are apportioned among the states according to their respective populations, and that senators must be at least thirty years of age and serve for six years, whereas representatives need be only twenty-five years of age when elected, and have but a two years' term.

The chief reasons which led to this change in the method of electing senators were the following:

In the first place, experience had shown that in many cases much time of the state legislatures was taken up in effecting the election of senators—time which was badly needed for the exercise of the primary functions of the state legislatures, namely, the enactment of laws.

In the second place, it often happened that many members of the state legislatures were elected not because of their views regarding the legislative policies of the states, but solely because it was known that, if elected, they would vote for a certain person as United States senator. This not only sacrificed the interests of the states, but tended, to an unfortunate degree, to confuse state and national politics. In order to get a certain senator elected the states would thus find themselves saddled with legislatures which did not properly represent them with regard to their own local interests.

In the third place, many cases occurred in which it was practically certain that persons had secured their election to the United States Senate by the employment of improper influences, in short, by the purchase of the votes of enough of the members of the state legislatures to secure their own election. Even where open and direct corruption had not been practised, it was found that in one way or another, very wealthy men, or men who were connected with large railway or other business corporations, obtained election to the Senate. Thus it was felt that the great mass of the people were not being properly represented in the Senate, and that the so-called moneyed "interests"

Reasons  
for the  
change

Use of  
improper  
influences

were obtaining a disproportionate influence. It was therefore believed that if the senators were obliged to seek election directly from the whole body of voters of the states, not only would political corruption be lessened but a truer representation of the people obtained.<sup>1</sup>

It is yet too soon to determine what will be the results of the constitutional change thus made. The fact is to be noted, however, that, prior to the adoption of the amendment, the senators in a number of states by extra-legal, but none the less effective, methods, had been popularly selected, the legislatures formally ratifying the choice of the people. That the change will lead to the selection of a different class of senators, or reduce the amount of political corruption, is not so sure. In the United States the political parties are well organized and very powerful, so that in very many cases those who have control of the party machinery are able not only to exert a great influence over the voters, but to dictate who shall be the candidates for election. And thus, notwithstanding the change effected by the Seventeenth Amendment, experience may show that wealthy individuals or those who are connected with or who represent the interests of the large business corporations, may still obtain their election to the Senate by exercising an influence, corrupt or otherwise, upon these political "bosses" or leaders who are in control of the machineries of the political parties in the states.<sup>2</sup>

The theory that, in an elected legislative chamber and an elected executive, the entire people of a State find representation is in all cases more or less a fiction. The principle of national representation is a proper one to declare and, perhaps, an ideal to be approximated as nearly as

Possible  
results of  
change

Fictitious  
character  
of national  
representation

<sup>1</sup>See Lord Bryce's discussion, "The Money Power in Politics," *Modern Democracies*, Vol. II, p. 477.

<sup>2</sup>For a discussion of the issues involved see Haynes, *The Election of Senators*. Criticism by foreign observers, with particular reference to proposals for the reform of the House of Lords, is to be found in Marriott, *Second Chambers*, and Temperley, *Senates and Upper Chambers*. See also Bryce, *The American Commonwealth*.

practicable, but it can never be a complete reality; and this for two reasons.

Sectional  
influences

In the first place it has in all cases been found practically if not theoretically impossible to obtain representatives in the legislature who will be guided wholly by the interests of the whole State rather than by those of the special territorial areas from which they happen to be elected. The temptation to retain and increase one's popularity with his own constituents by securing legislative action that will be especially beneficial to them, even if not wholly consistent with the welfare of the whole State, is one which only the exceptional individual can resist. And it may also be said that the temptation is, if anything, still stronger upon the local constituency to urge that they receive, if possible, this preferential treatment. The best that can be hoped for, then, is to reduce this tendency, which is an admitted evil, to a minimum. It is still flagrantly in evidence, however, in the French Parliament and in the American Congress and in state legislatures. In England, however, this evil has been largely overcome, one of the means employed for securing this desirable result being a mode of dealing with what are called "Private Bills," which have to do with the interests of special localities.<sup>1</sup> It is also a fortunate fact that, under the present system of government in Great Britain, it is seldom that Parliament is called upon to make appropriations for purposes that will specially benefit particular localities. Then also, it is the fact that, under the rules of legislative procedure as they operate in the Parliament, measures introduced by private members, that is, members not cabinet officials, have very little chance of enactment, unless they obtain the approval of the Cabinet.

Private  
Bill  
legislation

Testifying before a committee of the American Congress, Mr. [now Viscount] Bryce, then British Ambassador to the

<sup>1</sup> Private bill procedure is fully described in Lowell, *The Government of England*, Vol. I, Chap. XX.



United States, said, with reference to private bills, that is, those which relate to a particular locality or which affect a particular person or group of persons:

They are sent to committees whose members make a solemn declaration that they will not be affected by any private interest in dealing with the bills. They are heard very much as a lawsuit is heard by counsel who present the case and who examine witnesses, and no member . . . . . is permitted to interfere in any way with the conduct of these committees in dealing with private bills. It would be a breach of our set rules for any private member, no matter how greatly interested his constituents might be in the bill, to endeavor to influence the consideration of a committee on that bill. Each committee is bound to deal with it fairly on the basis of the evidence submitted and with a view to the general public interest.

Procedure  
in  
England

In fact, however, the conditions under which members of the House of Commons are nominated and elected places them under far less temptation to use their influence and votes to secure special benefits for their constituents, and without due regard to the interests of the whole people, than is, unfortunately, the case with members of the American Congress. A full explanation of these conditions is not here possible, but it may be said that one of the most important of them is the fact that a member of the British Parliament need not be, and very frequently is not, a resident of the locality which elects him.

Representative  
character of  
Commons

In result, then, it is probably correct to say that the British House of Commons comes nearer than any other elected legislative body to realizing the ideal of a truly nationally representative chamber.<sup>1</sup>

<sup>1</sup>The fact should not be overlooked that the House of Commons is frequently said to be far from a "mirror of the nation." As recently pointed out by an acute critic:

"In the House of Commons of January, 1920, the following economic interests were represented there:—

Landowners . . . . .	115	General Manufacturers . . . . .	138
Insurance Directors . . . . .	61	Bank Directors . . . . .	28
Coal Directors . . . . .	17	Oil Directors . . . . .	4
Shipping Directors . . . . .	30	Lawyers . . . . .	102
Textile Manufacturers . . . . .	19	Brewers . . . . .	10
Army Officers . . . . .	50	Naval Officers . . . . .	12
Doctors . . . . .	10	Labour Members . . . . .	65

"Active  
citizenship"  
is limited

The second fact which ordinarily renders more or less fictitious the representation of the entire people is the circumstance that in all communities it is imperative to restrict the electoral franchise to but a portion of the entire population. The doctrine may be declared in absolute terms that government should rest upon the consent of each of the governed but, in fact, the rights of what is called "active citizenship"—eligibility to public office and the right to vote—have always been, and of necessity must be, confined to those who are deemed qualified intelligently and honestly to exercise these rights. Thus, as a working rule, persons under a certain age are universally disqualified; certain criminals, aliens, defectives, and the like have also been excluded, and not infrequently educational and property qualifications have been demanded. Also, until very recently, women have been wholly excluded from the right to vote. All of these exclusions have, of course, been defended upon the ground that those denied political privileges have not been qualified to exercise them honestly and wisely. At the same time the attempt has been made to square this practice with the doctrine of national sovereignty by asserting that those who do vote or so hold office "virtually" represent those who are without political rights.

Indirect  
representa-  
tion

"This table, indeed, does less than justice to the situation; for a member of Parliament may be a director of half a dozen companies of a similar nature and yet appear only once in each item of the table. Nor does it at all fully display the affiliations of which the House may make boast. There are no less than 158 members who, by birth or marriage or personal position, possess, or are related to persons with, hereditary titles; and this, be it noted, does not include the members of those 'county families' who are 'of' our aristocracy, even though an actual title be lacking. Oxford and Cambridge send 138 members between them to the House; and they are but few who can, without ample means, be educated there. The public schools, in the narrow sense of that term, have 148 representatives; and of these Eaton and Harrow contribute not less than 93. It is needless to point out that our public schools are not maintained for the education of the poor; and it thus becomes impossible to avoid the conclusion that the House, despite the broad bottom from which its powers are derived, is, in reality, the representative of an intricately connected plutocracy, the power of labour being submerged before the flowing tide with which Property, in its various forms, protects itself." Laski, "Mr. George and the Constitution," *The Nation* (London), October 9, 1920. For a different opinion see Belloc, *The House of Commons and Monarchy*.

That this is not the necessary result is certain. That in a proper government this is a possible result, is perhaps true; but it presupposes that those who have the rights of active citizenship are able to inform themselves of the needs and wishes of the unrepresented and to rise superior to the temptation to place their own interests and those of their constituents prior to those of those persons or classes of persons who have no means of exerting a direct political influence. History does not record a very considerable number of instances of this sort. The advantages of a restricted suffrage are therefore to be found in the superior intelligence of those who are able to qualify, rather than in the disinterestedness with which they exercise the monopoly of authority granted to them.

Restricted  
suffrage

For lack of a better method most matters in popularly controlled governments are determined by majorities. In almost all cases this is by a bare majority or even, in cases of elections, by simple pluralities. Only in exceptional cases is a two-third or larger vote demanded.<sup>1</sup> The result from this is that in each case in which a decision is arrived at, those in the minority appear to have their wishes wholly disregarded. They may constitute almost half of the electorate and yet, if the vote be for members of the legislature, obtain no representatives whatever in that body.

Majority  
rule

This, to many persons, has seemed unjust and inexpedient, and to prevent it various schemes have been devised to secure an electoral result by means of which different political parties or groups of voters may obtain legislative representation according to their respective voting strengths.

When there is an irregular geographical distribution of the voters of different political parties, a certain amount

<sup>1</sup>In some cases, especially with reference to constitutional amendments, it is required that, to be adopted, the proposal must receive a majority vote not simply of those voting, but of the entire registered electorate.



Minority  
representa-  
tion

of minority representation is secured by dividing an area of considerable size into smaller electoral districts from each of which one representative is chosen. Thus opportunity is offered to those parties which may be in a minority, if the whole area be considered, to elect representatives in those individual districts in which they may happen to be in a majority. Thus, for example, in the American House of Representatives and in the legislatures of the various states the minority party almost always obtains a certain amount of representation.

When, however, all the representatives are elected in groups from large districts, by what the French call *scrutin de liste*, the minority party may obtain almost no representation at all, and the same result follows in the single-member districts when the voting strength of the two or more parties is distributed with a fair degree of geographical uniformity throughout the State. Furthermore there is the objection to the single-member-district scheme that it encourages the evil, which has been earlier mentioned, of causing the representatives to consider themselves as deputed to look out for the special interests of their own little constituencies, rather than the welfare of the entire State.

Various  
expedients  
tried

A considerable variety of plans have been devised for obviating the evils which have been mentioned. These various methods, which cannot here be described, all have for their purpose the securing of electoral results which will correspond, in a mathematical sense, more nearly with the actual voting strengths of the various currents of political opinion.<sup>1</sup>

This ideal, upon first inspection, seems a very reasonable one. Aside, however, from the difficulty of making them fully understandable by the ordinary voter, there is the defect that where there are but two political parties to be represented, each party will nominate only that number

<sup>1</sup>See below, Chapter XV.



of persons whom it is reasonably sure it can elect. The result is that a nomination becomes, in very many cases, practically equivalent to an election. This means that, instead of the electorate selecting their representatives, they are practically appointed by the political party organs which have the power of making nominations. This result, in turn, can be prevented only by resorting to what are known as primary elections, in which the voters of each party engage in a campaign and an election in order to determine who their nominees shall be. The system of primary elections has, however, its own defects. It complicates the whole electoral process, adds one more stage to it, increases the expense, and, what is perhaps most unsatisfactory of all, stirs up animosities within each party and thus tends to break them up into smaller groups.<sup>1</sup>

Primary  
elections

Where there are more than two parties seeking representation, or where the electoral scheme is one according to which any group of a fixed number, irrespective of their geographical distribution, may, by combining their votes upon one or more persons, obtain their election, the result is that the legislature, when it convenes, finds itself composed of a motley gathering of members with divergent views. This means almost surely an elaborate process of log-rolling in order to get together into one group a sufficient number of members to control the legislature. The support of each small group is purchased by agreeing to support the special policies in which it is interested, in return for its agreement upon its part to vote for the measures advocated by the other groups. In this way policies are adopted by the legislatures which have in fact the support of but small portions of the people, so that, if we judge by the final results reached, the people are not so accurately represented as under the ordinary system of

Minor  
political  
parties

<sup>1</sup>Lord Bryce is very sceptical of the value of primaries. See *Modern Democracies*, Vol. II, p. 129 ff.

voting which makes no attempt to provide for minority or proportional representation.

These possible results are pointed out not with a view to asserting that schemes for minority representation are in all cases unwise: the purpose has been merely to show that these plans, attractive upon their face, involve ultimate consequences which need to be considered.<sup>1</sup>

Local  
option

It not infrequently happens that a question arises whether or not a political policy shall be adopted which is without considerable importance to the whole State, but is of peculiar importance to the people of a given locality. In such cases there would seem to be no objection to submitting this question to a vote of the people especially concerned. Thus, in the United States, it was not unusual to permit the voters of each city or county or other administrative area to determine whether or not the sale of intoxicating liquors within their respective areas should be legalized; whether certain laws should be passed or taxes levied in order to make certain public improvements, etc. This is a procedure which cannot be criticized so long as local electorates are not permitted to pass upon questions which are of real significance to the entire State.

Direct  
and indirect  
control

It has been pointed out that the distinction between a democracy and a republic is that, in the former, the people attempt to exercise a direct and immediate control in the formulation and administration of the policies of the State, whereas, in the latter, this control is exercised (except in so far as provision is made for the initiative and referendum) indirectly through representatives which they have chosen.

It is clear then that, in so far as an attempt is made by the electorate to issue mandatory instructions which will

<sup>1</sup>The question of proportional representation will be considered more in detail later but it may be said here that it would have a tendency to break up the two-party system and on this ground is objected to by some critics. (W. F. Willoughby, *The Government of Modern States*, p. 329). On the other hand, advocates of proportional representation think that this is a small price to pay for the benefits which would result.

prevent their representatives from freely exercising their own judgment as to what the general welfare demands, the theory of representative government is departed from; the members of the legislature cease to be representatives and become mere delegates or agents automatically registering the decisions which the people have reached. And this, of course, means that, as to these instructed matters, discussion and debate in the legislative chambers is without meaning or result.<sup>1</sup>

Instructed  
and unin-  
structed  
represent-  
atives

With reference to the wisdom of the attempt upon the part of the electorate to bind the judgment of their representatives, it is to be said that the utilitarian justification of representative government is not based simply upon the ground that in a State of any considerable size it is not practicable for the people directly to exercise political powers, but upon the further ground that there are many matters upon which no people are qualified to give an intelligent decision, although they may be qualified to select persons of superior intelligence, knowledge, and technical training who can appreciate what are the true interests of their constituents and devise the administrative means by which they may best be promoted. This does not

Competence  
of the  
people

<sup>1</sup>There is an adequate discussion of instructed *versus* uninstructed representation in Garner, *Introduction to Political Science*, p. 478 ff. The classic statement is that of Burke to the electors at Bristol:

"Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a member of *parliament*." [1774].

"I was not only your representative as a body; I was an agent, the solicitor of individuals; I ran about wherever your affairs could call me; and in acting for you I often appeared rather as a ship-broker, than as a member of parliament. There was nothing too laborious or too low for me to undertake. The meanness of the business was raised by the dignity of the object." [1780].

"If we do not give confidence to their minds, and a liberal scope to their understandings; if we do not permit our members to act upon a very enlarged view of things; we shall at length infallibly degrade our national representation into a confused and scuffling bustle of local agency." [1780].

The nature of the mandate of a representative involves two distinct questions: (1) Whose interests should he work for? and (2) Whose judgment should he follow?



mean that the people may not be able to express an intelligent opinion, through their political parties and otherwise, upon certain broad lines of public policy, but that they are not competent to decide upon matters an understanding of which requires specialized and technical training. And as to many of these matters it would appear that the representatives themselves are wise if they leave the decision to their leaders or to the executive, reserving to themselves only rights of supervision, criticism, and ultimate control. This is a topic which is more particularly discussed in the chapter dealing with the proper functions of representative legislative chambers.

The Refer-  
endum

Before leaving this subject it may be mentioned that the same considerations which make it unwise for an electorate to attempt to control the judgment of its representatives make it also unwise for them, by the referendum, to attempt to determine matters regarding which it is practically impossible for them to form an intelligent opinion.<sup>1</sup>

#### TOPICS FOR FURTHER INVESTIGATION

Critics of Democracy.—Lecky, *Democracy and Liberty*; Maine, *Popular Government*; Inge, *Outspoken Essays*; Mallock, *The Limits of Pure Democracy*; Hearnshaw, *Democracy at the Crossways*; Dicey, *Law and Opinion in England* (rev. ed.). Cf. also Bryce, *Modern Democracies*, and the two essays in the fourth series of Lord Morley's *Miscellanies*.

The Merits and Defects of Direct Legislation.—Barnett, *The Initiative, Referendum, and Recall in Oregon*; Bonjour, *Real Democracy in Operation*; Garner, *Introduction to Political Science*;

<sup>1</sup> The chief difficulties with respect to the referendum are, of course, that a popular vote on most questions is likely to be vague. If the referendum is on a general principle (for example, an elected House of Lords), it is of little avail for the crux of the matter is the manner of election. On the other hand, if some detailed scheme were proposed, voters, in favor of the general principle, might oppose on account of objectionable details. Furthermore, as has been said, frequent use of the referendum would weaken legislative responsibility. There is a very excellent discussion of the question in Bryce, *Modern Democracies*, Vol. II, Chap. LXV. See also Dicey, *The Law of the Constitution* (ed. 1915), p. xci ff.; Lowell, *Public Opinion and Popular Government*, p. 152 ff.



Bryce, *Modern Democracies*; Lowell, *Public Opinion and Popular Government*; Mallock, *The Limits of Pure Democracy*; Dicey, *Law of the Constitution* (8th ed.).

Second Chambers in the British Empire.—Curtis, *The Problem of the Commonwealth*; Keith, *Responsible Government in the British Dominions*; Bryce, *Modern Democracies*; Marriott, *Second Chambers*; Temperley, *Senates and Upper Chambers*; Jenks, *The Government of the British Empire*.

Instructed *versus* Uninstructed Representation.—Garner, *Introduction to Political Science*; Burke, *Selected Works*; Lowell, *Public Opinion and Popular Government*; Mill, *Representative Government*.

The Utility of the American Senate.—Bryce, *The American Commonwealth* and *Modern Democracies*; Wilson, *Congressional Government*; Haynes, *The Election of Senators*; McCall, "Again the Senate," *Atlantic Monthly*, September, 1920; Corwin, "Mr. McCall on the Senate," *The Review*, October 6, 1920.

The Value of Primaries.—Merriam, *American Political Ideas* (1920) and *Primary Elections* (1909); Taft, *Popular Government*; Goodnow, *Politics and Administration*; Ford, "The Direct Primary," *North American Review*, Vol. C X C, p. 1.

## CHAPTER X

### THE EXECUTIVE BRANCH OF GOVERNMENT

#### The Duties of the Ex- ecutive

SPEAKING generally, the executive branch of government has to do with the execution of the policies of the State.<sup>1</sup> These policies may find embodiment in the written constitution, if there is one, or in acts of the legislature. With reference to the powers thus created or granted, the executive agents may have a broad discretion as to the manner in which their duties are to be performed, including the right to issue specific rules or ordinances which will be legally obligatory upon those to whom they are addressed; or they may have only the routine task of carrying into effect the commands specifically laid upon them without the exercise of any independent judgment.

In so far as executive powers owe their origin to the written constitution from which all the organs of government derive their powers, they may not be controlled by the legislature; nor are they subject to judicial review, except to determine the question whether or not the limits of the granted authority have been overstepped. And it

<sup>1</sup> "At the present time, the executive in every State, with one exception, is organized on the single-headed principle. The exception is found in the constitution of the Swiss republic, which vests the executive power in a council of seven persons. One of the seven bears the title and dignity of President of the Confederation and performs the ceremonial duties of the executive office, but, in reality, he is merely chairman of the council and shares the executive power equally with his colleagues. He is in no sense the supreme head of the administration and carries no greater responsibility than his fellow councilors. The practical working of the institution in Switzerland had been attended with less difficulty than in the plural form elsewhere, mainly on account of certain habits and traditions of the Swiss people, and because the ground had already been prepared through local experience. For a long time the collegial form of executive had existed in the separate cantons, and hence, when it was introduced into the constitution of the confederation, in 1884, the institution had passed the experimental stage." Garner, *Introduction to Political Science*, p. 521.

is equally true with regard to legislatively created executive powers that the courts may interfere only to see if the executive has kept within its legally defined sphere. With the specific manner in which a legislative or constitutional power has been employed, or good judgment displayed in the exercise of discretionary powers, the courts have nothing to say unless the executive has exceeded its authority.

Discretionary  
authority

Under practically all constitutional systems certain powers, which are sometimes spoken of, in a special sense, as "political," are vested in the chief executive, to be exercised by him according to his best judgment and good conscience. These powers are always reserved by a monarch for his own unrestrained use when he grants to his people a participation in their own government; and in fact the general principle is that the King retains all those powers which he has not specifically parted with to the legislature or to the courts. The chief executive of a republic has only those powers which the people have granted to him by the constitution, but, as has been said, there are always included among them certain "political" powers which it is deemed expedient that the head of the State should exercise, be he king or president. These executive powers, are exhibited in practically all governments. They include the pardoning power; the appointment and removal of public officials; the conduct of foreign relations; the control of the army and navy; the convening and dissolution of legislative chambers; the giving of information and the making of recommendations to the legislature; and, in some cases, with or without the approval of one or both of the branches of the legislature, the declaring of war or peace; the establishment of martial law, and the suspension of such special constitutional guarantees as the writ of *habeas corpus*.

"Political"  
powers

It is evident that these executive powers can be distinguished from those which are connected with the enforcement of the general laws of the State. No complete enu-

meration of them can be made, and they vary in number under different constitutional systems. Their general character, however, is well described by the Chief Justice Marshall, in one of his most important opinions. In the case of *Marbury v. Madison*, decided in 1803, he said:

Marshall  
on the  
Executive  
Power

By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases their acts are his acts, and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the National, not individual rights, and, being entrusted to the Executive, the decision of the Executive is conclusive.<sup>1</sup>

Enforce-  
ment of  
the Laws

Besides the powers specifically vested in the chief executive of the State, he has in all cases the general duty of seeing that the authority of the State is everywhere maintained and its laws duly executed. Thus the United States Constitution, after declaring that the "executive power" shall be vested in the President, goes on to say that "he shall take care that the laws be faithfully executed." In a monarchy this obligation rests upon the monarch, without any specific delegation of power to enforce the law. The maintenance of the authority of the State is an obligation and not a grant; but there is implied in the very nature of the chief executive's office the authority to employ all the constitutional powers that he possesses, including the use of the State's military forces, to maintain the government in its efficient operation; to protect, everywhere and under all circumstances, public officials in the execution of their official duties; to supervise them in their duties; to remove them from office or to pro-

<sup>1</sup>I Cranch 137 (1803).



secute them civilly or criminally in cases of malfeasance or nonfeasance; and to see that similar action is taken against private persons who refuse obedience to law. In the first instance, and ordinarily, these duties fall upon the lower executive and judicial officers, and the execution of their orders is in the hands of the local police or constabulary forces, aided, if necessary, by private individuals, who are summoned as a *posse comitatus* to assist in the maintenance of law and order; but, in the last resort, if these fail, the entire armed forces of the nation may be employed to secure the enforcement of any state command, whatever it may be.

In the United States, operating as it does under a written constitution which is conceived of as the source of all governmental authority, the President possesses only those powers which are expressly or by necessary implication vested in him. In the absence of further authority delegated to him by Congress it is only these powers that he may employ in "taking care that the laws be faithfully executed."<sup>1</sup> He cannot, therefore, be said to have "inherent" ordinance-making powers. In France, however, although a republic, the President has a general authority to issue ordinances, or "decrees" as they are called, to supplement and make effective the carrying out of statute laws. The power thus recognized is due to principles inherited from the times when France was a monarchy.<sup>2</sup>

In England, in legal theory, the King possesses a plenitude of executive authority, except as limited by Acts of Parliament. These so-called "prerogative powers," which are inherent in him as the wearer of the crown, are, however, according to firmly fixed constitutional practice, ex-

Delegated  
and inher-  
ent powers

The  
English  
theory

<sup>1</sup>But see the decision of the United States Supreme Court, *In re Neagle* 135 U. S. 1 (1890) which upheld a rather broad authority in the President to see that the laws are faithfully executed, even when there are no specific "laws." There is an amusing account of this important case in Taft, *Our Chief Magistrate and His Powers*.

<sup>2</sup>See Goodnow, *Comparative Administrative Law*, Book II, Chap. IV; Sait, *Government and Politics of France*, Chap. II.

exercised only at the discretion of his ministers, who assume responsibility before Parliament for the advice which they give.<sup>1</sup>

The  
monarchical  
conception

The Prussian Constitution, on the other hand, was not considered as an instrument which contained an enumeration of all governmental powers. Upon the contrary, it was viewed simply as placing certain limitations upon the authority of the King, in whom all legal authority originated. The Prussian King, therefore, in contemplation of law, had all the powers except those which were expressly or by necessary implication withdrawn from him.<sup>2</sup> This status will be particularly considered in the chapter in which the German conception of constitutional monarchy is examined.

Provisions  
of U. S.  
Constitution

Aside from the powers which by constitutional law are vested in the chief executive of a State for his discretionary exercise, and aside from the general provisions which most written constitutions make with regard to the establishment of certain great executive departments, the machinery which exists for the performance of the administrative functions of government is a matter wholly within the control of the legislative branch. The Constitution of the United States does not even specify what executive "Departments" shall exist, or, when established by law, what their relation shall be to the President or to Congress. It has thus been left for Congress to determine

<sup>1</sup>Ogg, *The Governments of Europe*, Chap. V; Lowell, *The Government of England*, Vol. I, Chap. I; Marriott, *English Political Institutions*, Chap. III. "This responsibility of ministers appears in foreign countries as a formal part of the Constitution; in England it results from the combined action of several legal principles, namely, first, the maxim that the king can do no wrong; secondly, the refusal of the Courts to recognize any act as done by the Crown, which is not done in a particular form, a form in general involving the affixing of a particular seal by a Minister, or the counter-signature or something equivalent to the counter-signature of a Minister; thirdly the principle that the Minister who affixes a particular seal or countersigns his signature, is responsible for the act which he, so to speak, endorses; this again is part of the constitution and a law, but it is not a written law." Dicey, *Law of the Constitution*, p. 25.

<sup>2</sup>Lowell, *Governments and Parties*, Vol. I, Chap. VI; Dupriez, *Les Ministres*, Vol. I, p. 350; Robinson, *Annals of the American Academy of Political and Social Science* (supplement), September, 1894.

from time to time into what great administrative services the various executive offices shall be segregated. It has also remained within the discretion of Congress to decide whether the various administrative officials for whose existence and powers and compensation it provides, shall be subject to the orders of the President, or, within the limits of the authority granted them by Acts of Congress, to be severally independent and subject only to the control of the courts in case of malfeasance or nonfeasance of office.

It has thus been constitutionally possible for Congress to maintain a very close control of the executive branch of government, with the exception, of course, of the constitutional powers of the President. This it has had the power to do by the enactment of laws which set forth in minute detail just what shall be the powers granted to, and the manner of their exercise by, various administrative officials, by making it necessary that reports of executive action be transmitted directly to itself, and by refusing to provide that the President shall have authority to issue mandatory orders to these officials with regard to their exercise of the discretionary powers vested in them by law. As a matter of fact, however, as will be more fully discussed later,<sup>1</sup> Congress has seen the unwisdom of attempting to keep too tightly in its own hands the control of the details of administrative action, and has in many cases contented itself with a general statement of policy or the laying down of a general rule of law, leaving to the agents who are to execute the law wide discretionary powers.

An examination of the Statutes of Congress shows that in the aggregate great discretionary powers of administration have been vested in the President, and thus his constitutionally granted powers have been greatly added to by congressional delegation. Furthermore, there is the important fact that in a considerable number of those cases in which Congress has created special administrative

Control  
of Execu-  
tive by  
Congress

Large  
authority  
of President

<sup>1</sup> Chapter XI "The Legislature as a Law Making Body."



agencies, it has given to the President an executive oversight over their operations, and an authority to control their actions by the issuance of administrative orders which must be obeyed. These orders have the force of mandatory commands for the enforcement of which, if necessary, the assistance of the courts may be obtained.

In addition to the powers thus possessed by constitutional grant and legislative delegation, the President has been further able to increase his control over the whole executive service of the national government by the exercise of a power which, though not expressly granted to him by the Constitution, has nevertheless been held by the courts to belong to him.<sup>1</sup> This is the power to remove from office those persons who refuse to follow his wishes in matters of administrative policy. To the offices thus made vacant he can appoint other persons who will do as he desires. This power of removal he is able to exercise without securing the approval of the Senate, even though the approval of that body may have been necessary for the original appointments of the persons removed;<sup>2</sup> and he

His Power  
of  
removal

<sup>1</sup>In *Shurtleff v. United States*, 189 U. S. 311 (1903), the Court said: "It cannot now be doubted that, in the absence of constitutional or statutory provision, the president can, by virtue of his general power of appointment, remove an officer, even though appointed by and with the advice and consent of the Senate. *Ex parte Hennen*, 13 Pet. 230; *Parsons v. United States*, 167 U. S. 324, and cases cited. To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the president and confirmation of the senate, would require very clear and explicit language. It could not be held to be taken away by mere influence or implication." The right of removal "inheres in the right to appoint, unless limited by constitution or statute. It requires plain language to take it away."

As would seem natural, in other constitutional governments there is no intimation that the power to appoint fails to carry with it the power to remove: "When the dismissal of a subordinate member of the administration has been determined upon, it is customary for a formal letter of dismissal to be addressed to the person in question by the prime minister, after he has taken the royal pleasure thereon." Todd, *Parliamentary Government in England* (ed. Walpole), Vol. II, p. 23.

<sup>2</sup>On May 27, 1920 President Wilson vetoed the bill creating a budget system. He objected to the provision "that the comptroller general and the assistant comptroller general, who are to be appointed by the President with the advice and consent of the Senate, may be removed at any time by a concurrent resolution of Congress after notice and hearing when, in their judgment, the comptroller general or assistant comptroller general is incapacitated or inefficient, or has been guilty of neglect of duty, or of malfeasance, in office, or of any felony



may base his action upon refusals to follow his directions when there is no claim that he has a legal authority to command.

In result it has come about that the administrative system of the national government of the United States is what is called a "centralized" or "integrated" one, the inferior executive officials being held to obedience to their immediate superiors, and they, in turn, to their superiors, until the heads of the great departments or other units of the executive branch are reached. Centralizing tendencies are still going on, but the development has been sufficient to warrant the statement that the national administrative service is an integrated one and, as will be presently shown, especially does it justify this description when compared with the systems which prevail in the individual states of the union, although recent reorganizations of the administrative systems of several states have effected material improvements. Furthermore this integration of the national administrative service has for years shown, and still shows, a steady tendency to increase in degree and amount.<sup>1</sup>

American  
system an  
integrated  
one

or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. The effect of this is to prevent the removal of these officers for any cause except either by impeachment or a concurrent resolution of Congress. It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident, the power of removal derived from the Constitution."

It is very doubtful whether the President's theory of the inability of Congress to limit his power of removal of inferior officers is correct. See a very good discussion by T. R. Powell, "The President's Veto of the Budget Bill," *National Municipal Review*, Vol. IX, p. 538 (September, 1920). On the question of the tenure of office act see, Dunning, *Essays on the Civil War and Reconstruction*, p. 302.

<sup>1</sup>A different problem is presented in France where the issue is local autonomy against national control. "French writers complain that many matters of purely local interest are administered and controlled by a Minister at Paris who from his office may touch a button and give orders to 89 prefects, 276 sub-prefects, 36,000 mayors, hundreds of public prosecutors and more than half a million other functionaries." To a large extent also, centralization applies with respect to legislation of a local character. "The legislative competence of the local councils is much restricted and in consequence the national parliament legislates upon many matters which in the United States are left to local legislative bodies or other authorities." Garner, "Administrative Reform in

It cannot be doubted that an integrated administrative system has very distinctive merits. Power and responsibility are definitely located and prompt and energetic action can be taken. But there are two further advantages. The very fact that the officials are rendered more powerful increases the likelihood that the people will take a greater and more intelligent interest in their selection; and, because more powerful, these offices become attractive to really able men.

The statement has often been made that the form of a government is relatively unimportant as compared with the character of those who administer it:<sup>1</sup> that almost any government will yield good results if the magistracy be efficient and disinterested.<sup>2</sup> This is undoubtedly true and yet the fact is that efficient and honest individuals cannot be secured for public office unless a government is so organized as to attract them to its service.<sup>3</sup> Emolument and even dignity will not in themselves draw men of true

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France," *American Political Science Review*, Vol. XIII, pp. 17, 19, 20 (February, 1919). There is a voluminous but very interesting literature on this central control which the French writers call the *tutelle administrative*. The controversy is adequately dealt with by Garner, in the article quoted, and by Sait, *Government and Politics of France*, Chaps. IV and VIII. See also P. W. L. Ashley, *Local and Central Government*, for a discussion of the relations between the central and local authorities in France, England, and Germany.

<sup>1</sup>"The laws reach but a very little way. Constitute government how you please, infinitely the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of ministers of state. Even all the use and potency of the laws depends upon them. Without them your Commonwealth is no better than a scheme upon paper; and not a living, active, effective constitution," Edmund Burke, "Thoughts on the Present Discontents," *Selected Works* (Oxford ed.), Vol. I, p. 32.

<sup>2</sup>In Pope's much quoted couplet:

O'er forms of government let fools contest;

That government is best which is administered best.

<sup>3</sup>"Democracy can justify itself only by sorting out the best brains of the nation, and by setting them to work for which they are fittest." Ramsay Muir, *Peers and Bureaucrats*, p. 57. "Every form of government must be held responsible for the type of man whom it tends to bring to the front, and he who would weigh the merits and defects of democracy must take into account the character of the democratic leader." Hobhouse, *Democracy and Reaction*, p. 184. See also the chapter on "Government by Amateurs," in Sir Sidney Low, *The Governance of England*. The form of government is also important in that a form that concentrates responsibility and power gives an incentive to honesty and efficiency that, in view of the frailty of human nature, is always needed.

ability; opportunity for the exercise of power is necessary. The *personnel* of a government is thus determined, not only by the intelligence of the electorate, but by its form. Viewed in this light, the form of a government, and especially its administrative organization, is of primary importance. For, given a satisfactory political arrangement in these respects, and an electorate that is fairly intelligent and alert, an efficient magistracy will almost inevitably result. As a corollary of this, it may be said that, if efficient government is to be secured, the executive chiefs must be granted not only hierarchical control over their subordinates, but as wide a sphere as possible for independent choice in the selection of means for carrying into effect the policies determined upon by the peoples' representatives in the legislature. This does not mean that the executive chiefs should be recognized to have inherent powers—prerogative powers as it were—to take action which has not been given legislative sanction. But it does mean that the legislature should not, in its enactments, attempt by detailed provisions to keep such an absolute control over the execution of the policies which it determines, as to prevent those who are to execute them from exercising an intelligent judgment with reference to the best means for meeting conditions and overcoming difficulties which it is absolutely impossible for the legislature to foresee.

Responsi-  
bility and  
efficiency

Danger of  
legislative  
control

Here we may adopt as a principle what Chief Justice Marshall declared as a constitutional doctrine in *McCulloch v. Maryland*<sup>1</sup> when he repudiated that construction of the implied powers of Congress which would have limited its authority to the enactment of only those laws absolutely essential for carrying into effect its express powers. If his language is changed from the declaratory to the admonitory form, and is applied to the case in point, it reads as follows:

<sup>1</sup>4 Wheaton 316 (1819).



Discretion  
must be  
allowed

The subject is the execution of these great powers on which the welfare of the nation depends. It should be the intention of those who give these powers to insure, as far as human prudence can insure, their beneficial execution. This cannot be done by confiding the choice of means to such narrow means as not to leave it in the power of those who exercise them to adopt any which may be appropriate, and which are conducive to the end. . . . To prescribe the means by which government shall, in all future times, execute the powers . . . will be an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must be seen dimly, and which can best be provided for as they occur. To declare that the best means shall not be used, but only those which the legislature sees fit to select, will be to deprive the executive of the capacity to avail itself of experience, to execute its reason, and to accommodate its acts to circumstances. If we apply this principle to any of the powers of government, we find it so pernicious in its operation that we are compelled to discard it.

The only dangers which are alleged to be inherent in such a system are that there is a tendency for what are called bureaucratic ideas to develop, and that, as tested by the requirements of popular government, the officials are not sufficiently under the control of public opinion either as directly expressed at the polls or as voiced by their representatives in the legislature.

The danger  
of bureau-  
cracy

By "bureaucratic" ideas, when the term is used as one of reproach, is meant stiffness in action, "red tape," and lack of enterprise; an indisposition to give due regard to qualifying conditions and, therefore, to apply rules with unnecessary harshness and technical rigor; a tendency upon the part of officials to regard their offices as private possessions, to treat with superciliousness the persons who require their services, and to feel a responsibility, not to the public, whose servants they are, but only to their administrative superiors.<sup>1</sup>

<sup>1</sup> On the problem of bureaucracy see the discussions of nationalization, *e. g.*, Davies, *The Case for Nationalization*, Chap. III; Hodges, *Nationalization of the Mines*. Of importance also are Bagehot, *The English Constitution* (Amer. ed.), p. 260 ff; Garner, *Introduction to Political Science*, p. 197 (and references),



That there are dangers such as these in a highly integrated administrative service there can be no doubt, but they are dangers which can be guarded against and avoided. As regards the claim that such a system is not sufficiently amenable to popular control, it may be said that it is undesirable that this popular control should attach to those inferior administrative duties in the execution of which no discretionary or policy-forming function is involved, and that, as to the higher administrative officials who do have discretionary powers, the centralizing of authority in them fixes their responsibility and thus makes it more possible for the people to visit censure or approval.

It has been shown that, except as specifically provided in the written constitution, where one exists, it is the function of the legislature to determine what the State shall do, and what instrumentalities and modes of governmental action shall be provided. Thus the legislature sets tasks to the executive and directs the manner in which they shall be performed. A question of very great importance, and one which is answered differently in different countries, is whether the legislature shall attempt to give detailed instructions to the executive agents or content itself with general mandates and thus leave wide spheres of administrative discretion to those whose function it is to apply the legislative rule to specific instances and facts.

Generally speaking it may be said that the practice of European countries has been for the law-making bodies to establish certain broad policies and to lay down general rules for the guidance of the executive, leaving to the several officials or organs of the administrative service the duty or discretionary power to make the general directions thus given fit the necessities of the different conditions to

The character of legislative mandates

European practices

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and Ramsay Muir, *Peers and Bureaucrats*. The most comprehensive study—covering the whole field and containing many valuable suggestions—is Joseph Barthélemy, *Le Problème de la compétence dans la démocratie* (1918).

English Orders in Council

which they become applicable.<sup>1</sup> When this practice is followed it means the giving to executive agents what is called an ordinance-making power, in pursuance of which certain special rules and regulations may be issued which have the force of law. The ordinances thus issued may be of immediate effect, or they may require legislative approval. In England, the orders of the first class are known as Statutory Orders and those of the second class as Provisional Orders.<sup>2</sup>

Legislative rule and administrative discretion

An illustration will make this sufficiently plain: The legislature passes a law stating in general terms that manufacturing establishments shall be operated with a due regard to the health and safety of the persons employed in them. The enforcement of this law is placed in the hands of a Board of Commissioners which is supplied with a certain sum of money for expenses and authorized to promulgate rules and regulations the violation of which shall be attended by certain penalties. The Board, within the limits permitted by the money which it has to spend, thereupon appoints a corps of factory inspectors, classifies the factories into groups according to the size and nature of the industry, and promulgates a body of detailed regulations or ordinances which state just what, in the Board's judgment, it is necessary that the factories of each group shall do in the way of installing safety-devices, furnishing sufficient light and ventilation, providing certain sanitary appliances, etc.

As contrasted with the European practice, the tendency

<sup>1</sup> "It may be doubted whether, with the great extension in the sphere of government, Parliament could be suffered to move at its present pace were it not for the growing practice of delegating legislative power. We hear much talk about the need for a devolution of the power of Parliament on subordinate representative bodies, but the tendency is not mainly in that direction. The authority of this kind vested in the county councils by recent statutes is small, too small to affect the question. The real delegation has been in favor of the administrative departments of the central government, and this involves a striking departure from Anglo-Saxon traditions, with a distinct approach to the practice of Continental countries." Lowell, *The Government of England*, Vol. I, p. 363. See also Ilbert, *Legislative Methods and Forms*, Chapter III.

<sup>2</sup> Lowell, *The Government of England*, Vol. I, p. 383.

in the states of the American Union has been for the legislature to attempt itself to fix in the laws which it passes detailed distinctions as to just what shall in all cases be required to be done in order that the policy of the law shall prevail. Within comparatively recent years, however, there has been shown a marked movement towards the European method, and that this is a wise development in American administrative methods there can be no possible doubt. Not only is it apparent that a permanent board, devoted exclusively to the execution of a single subject, is better able than is a legislative body, to obtain an accurate knowledge of the specific conditions that are to be met and to adopt measures that correspond to them, but, what is equally important, its rules are flexible, in the sense that they can be easily changed from time to time in order to meet changing conditions or to correct defects in them which experience discloses. When a regulation finds a place in a Statute, it is fixed until an amendment of the Statute can be obtained from the legislature. That which in the past has deterred American legislatures from following the European practice, has been, in the first place, a mistaken idea that the principles of popular government require that the people's representatives in the legislature should keep the administration of public affairs as far as possible in their own hands; and, secondly, a distrust of the efficiency and honesty of the executive officials. These objections disappear, however, when the truth is recognized that the essential aim of popular government is realized when the people or their representatives are permitted to lay down the general policies of the State, and when the administrative service is improved by basing appointments, promotions, and continuance in office upon the honesty, intellectual ability, and technical training of the incumbents and not upon a political partisan basis.<sup>1</sup>

The  
American  
theory

Its justifi-  
cation

<sup>1</sup>See Fish, *The Civil Service and the Patronage*; Holcombe, *State Government in the United States*, p. 338 ff.; Moses, *The Civil Service of Great Britain*.



Political and  
legal re-  
sponsibility

Along with the delegation by the legislature of ordinance-making and other discretionary powers to administrative experts must of course go the adoption of methods by which these agents may be held to both political and legal responsibility for the manner in which they exercise their powers. Political responsibility should attach, not to the clerks and other officials who have only routine (or, as they are known in legal parlance, "ministerial" duties to perform), but only to those higher executive chiefs who have discretionary, and, what may be called, policy-forming functions. Strict legal responsibility should attach to everyone in the administrative service, and this means that the legal powers of each official must be strictly defined; that every act in excess of those powers should be without legal force, and that for their commission the responsible one may be held civilly or criminally responsible in the courts. It is elsewhere pointed out that the determination whether a public official has exceeded his powers may be determined either in the ordinary courts of law or in special administrative tribunals—American and English practice in this respect following the former method.

Publicity  
is  
essential

In order that either political or legal responsibility of public functionaries may be effectively enforced, it is necessary that, as far as possible, publicity should be given to all official acts. This means not only that public records should be open to examination, but that detailed published reports of their operations should be required of all governmental agencies. Published official reports play, indeed, a very prominent part in any government in maintaining real and effective popular control of its operations.

With regard to the legal force that may be given to administrative orders, two alternatives are open. It may be provided that these orders shall be immediately effective, so that they may be enforced unless those affected by them are able to obtain a restraining order from a court upon the



ground that they are not warranted by the law under which the authority which issued them is acting; or, it may be provided that, when these orders are resisted or disobeyed, it will be necessary for the authority issuing them itself to go to the courts and obtain a decree declaring their validity.

It is clear that the first method gives the greater power and effectiveness to administrative agents, but there may be circumstances which make it unwise that this extent of authority should be granted to them. When Congress first established the Interstate Commerce Commission, its orders could only be enforced after the Commission had resorted to the courts for the appropriate decrees. Congress later held it wise, however, to make the Commission's orders immediately effective. In another respect it also greatly increased the powers of the Commission beyond those which it originally possessed. At first it was empowered to declare that a given rate charged by an interstate transportation agency was unjust or unreasonable, but it was not authorized itself to fix and enforce the rate which it might deem proper. By a later Act, however, this rate-making power was expressly granted by Congress. Although wide ordinance-making powers are now frequently given to administrative agencies, it is very seldom that they are authorized to determine the penalties which shall attach to disobedience to the orders which they issue. This is a right which legislatures almost always, and properly, reserve to themselves.<sup>1</sup>

When administrative agencies have ordinance-making powers, they of course have an authority which is essentially legislative in character. This power they exercise within the limits which the legislature has fixed for them, but it is none the less a law-making one. When interpreting and applying these orders to particular cases they also exercise a function which is essentially judicial in character and, when so acting, they sit as courts, hearing witnesses

Criminal  
sanctions  
avoided

Legislative  
functions of  
the Execu-  
tive

<sup>1</sup>But see *U. S. v. Grimaud*, 220 U. S. 506 (1911).

and arguments of counsel, issuing orders and awarding damages or other forms of relief. The decrees which are issued in such proceedings are based upon certain determinations of fact, and the correctness of these determinations may be reviewed, upon appeal, by some higher administrative authority, or they may be reëxamined in the ordinary courts of law.<sup>1</sup> In very many cases, however, these administrative determinations of fact are made conclusive, so that those affected by them may not contest their correctness before any other tribunal. Thus it has been held that the judgment of the highest officer of the United States, to whom has been entrusted the administration of the immigration laws passed by Congress, that a person seeking admittance to this country is, or is not, under the law, entitled to entry, is final and conclusive.

However, under the provision of the Federal Constitution which declares that no one shall be deprived of life, liberty, or property, without due "process of law," it is held that administrative action shall not be taken without affording to the person affected by it a reasonable opportunity to have the facts as he believes them to be submitted to the authority which is to pass upon them. Furthermore, the right cannot be conceded to an administrative agency to determine finally the extent of its own powers. This is a purely legal question which the courts always have the power to pass upon. It may also be added, though this is a matter of constitutional law peculiar to the United

<sup>1</sup>"While, therefore, in some exceptional instances judicial control over administrative action may be restored, while in certain more exceptional instances it may be extended, it can hardly be doubted that the future will see that control on the whole diminish rather than increase, notwithstanding that the action of administration officers may be more extensive than ever before in the history of Anglo-American institutions. We have passed through an age of constitutional private rights and are approaching one of social control. What needs emphasis is no longer the inherent natural rights of the individual, but the importance, indeed the necessity, of administrative efficiency. For upon administrative efficiency depends the effectiveness of that social control without which healthy development in existing conditions is impossible." Goodnow, "The Growth of Executive Discretion," *Proceedings of the American Political Science Association*, Vol. II, p. 43 (1905).

Conclusive-  
ness of  
determina-  
tions

Due Process  
of Law

States, that an administrative order may always be attacked in the courts upon the ground that in substance it is so arbitrary or unjust as to pass the bounds of legitimate administrative discretion and amount to an unconstitutional deprivation of life, liberty, or property. The courts will exercise a right of review upon this ground without regard to what may be the legislative authorization under which the administrative agent is acting, for the guarantees of the Constitution protect the individual against legislative as well as against executive action.<sup>1</sup>

Executive  
Justice

#### TOPICS FOR FURTHER INVESTIGATION

Executive Ordinances.—Lowell, *The Government of England*; Sait, *Government and Politics of France*; Willoughby, *Constitution Law of the United States*.

Executive Justice.—For references, see the note below.

Bureaucracy.—Garner, *Introduction to Political Science*; W. F. Willoughby, *The Government of Modern States*; and see above, p. 188.

The President's Power of Removal.—For references, see above, pp. 184, 185.

Executive Irresponsibility.—Wilson, *Congressional Government*; Bagehot, *The English Constitution*; Kales, *Unpopular Government in the United States*; Ford, *The Rise and Growth of American Politics*; Bryce, *The American Commonwealth*; Lowell, *Essays on Government*.

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<sup>1</sup>On the whole question of executive justice, see Pound, "The Revival of Personal Government," *Proceedings of the New Hampshire Bar Association*, 1917, p. 13; "Executive Justice," *American Law Register*, Vol. LV, p. 137; Powell, "Judicial Review of Administrative Action in Immigration Proceedings," *Harvard Law Review*, Vol. XXII, p. 360. On England's *droit administratif*, see Dicey, *The Law of the Constitution* (8th ed.) p. xxxvii ff; *Law and Opinion in England* (2nd ed.) pp. xli ff; *Local Government Board v. Arlidge* [1915], A. C. 120; and *Law Quarterly Review*, Vol. XXX, p. 150. For a discussion of the French administrative courts, see Sait, *Government and Politics of France*, Chap. XI.

## CHAPTER XI

### THE LEGISLATURE AS A LAW- MAKING BODY

Separation  
of Powers  
Theory

THE threefold division of state functions into legislative, executive, and judicial is, in its general statements, a sufficiently clear and logical one. When, however, we examine the legislative, judicial, and executive organs of government in their actual operation it is found that, however distinct may be the three ideas of enacting, interpreting and applying, and enforcing of laws, the lines of division become more or less confused, for many public acts exhibit qualities of two or even of all three of these operations.

Thus a legislature, acting under a written constitution, necessarily has to interpret the provisions of that constitution in order to determine in the first instance the extent of its law-making powers. In most of the states possessing written instruments of government this interpretation is final and not open to question by any other organ of government. So also when legislatures determine the qualifications of their members or decide election contests, or present and try impeachments, or enact bills of attainder, they are exercising functions that are clearly judicial in character. The same is true when they discipline their own members or institute proceedings against those other persons whom they may judge to be guilty of contempt against themselves by interfering with their dignity or decorum or that of their members, or where there is a refusal to obey a specific order issued by them, as, for example, to produce documents or to appear and testify before themselves or one of their committees.

Impossi-  
bility in  
practice

So, similarly, a legislature exercises executive functions



when it participates in the pardoning, appointing, or treaty-making powers, or where it provides for the application to specific cases of the enforcement of the laws which it enacts without the interpretation or aid of the other departments of government. This is substantially true when these laws are carried into effect through committees of the legislature or by commissions which act under the control of and are directly responsible to itself, and are not subject in any way to any superior executive officer.

In the United States, for example, the Library of Congress and the Government Printing Office are under the direct and sole direction and control of Congress. So, also the governments of the "Territories," though their chief officials are appointed by the President (with the advice and consent of the Senate), are nevertheless the direct agents of Congress and, from the standpoint of constitutional law, are viewed as parts of the legislative rather than of the executive branch of the Federal Government. The same status attaches to the Interstate Commerce Commission, which the Congress has instituted to carry into effect the laws which it has enacted in regulation of matters involved in inter-state transportation; and also to the Federal Trade Commission which is a congressional agent with reference to the application and enforcement of certain laws which have been enacted with regard to the operations of persons and corporations engaged in trade between the states of the Union.

Turning now to the courts which constitute the judicial branch of a government, we find them in all cases and by necessity performing many duties which are essentially executive in nature. Thus not only do they very commonly appoint certain court officials, such as bailiffs, criers, clerks, etc.—a function executive in character—but they exercise many purely administrative and non-contentious duties, such as those connected with the recording of deeds and wills, the probating of wills, the granting of letters of

Examples of  
confusion

Executive  
functions  
of Courts

administration, the supervision and care of the insane, of minors and other incompetents, and the appointing of assignees and receivers for the conservation of the assets of insolvent persons and corporations and the management of the property and undertakings pending a settlement with the creditors. They also appoint receivers for the winding up of businesses which have come under the ban of the law, in order that their assets may be conserved and distributed to those equitably and legally entitled to them. As a result of all these court functions it is a fact that at all times a very considerable amount of the property and business of a country is under the direct administrative control and operation of the courts; and there have been periods in the United States when many thousands of miles of the railways have been thus operated.

Within the legislative field also, the courts exercise important powers. In the first place they almost universally have the authority to establish the rules and regulations governing judicial practice and procedure, and this so-called "adjective" law constitutes a very important part of the whole body of the law to the control of which the lives and property interests of the individual are subordinated. By the provisions of these rules, also, is largely determined the extent to which substantial, speedy and inexpensive justice to the litigant is made possible.

But, far more than this, the authority which the courts possess of judicial interpretation, that is, of determining what the law is, if unwritten, or what it means, if written, vests in them a power which, in effect if not in form, is a law-making one. In the United States, in England, and in her great over-seas dominions where the doctrines of what is known as the "common law" prevail, the body of private laws and obligations have been built up almost wholly by the courts without any formal legislative action, and this process is still going on. This development of "judge-made" law has been made possible by the

Control of  
business

The Courts  
as Legis-  
latures

acceptance of what is known as the "doctrine of precedents," or *stare decisis*, according to which a principle applied by a court of competent jurisdiction is held to control the decisions of the same court or of coördinate or inferior tribunals in subsequent cases in which the doctrine is applicable.

"Judge-  
made"  
Law

The legal principles thus established are found in the opinions which the courts prepare to explain and justify the decrees which they render. The opinions which are rendered by the higher courts are printed and published and known as "Reports." In earlier years these Reports were known by the names, not of the courts or judges whose opinions they contained, but by the names of the persons who prepared them for publication. At the present time, however, they are almost universally known by the name of the court of the state in which they are rendered, and have serial numbers. Thus we speak of the eighty-first volume of Maryland Reports, or the twenty-second New Jersey Reports. The reported decisions of the United States Supreme Court are, however, known simply as United States Reports, although the first ninety volumes are still cited by the names of their reporters.

Court  
Reports

The point, however, that is of special importance in its bearing upon the part played by the courts in the development of law is that, although their opinions are to be found in printed form, the exact language in which they are stated is without significance. The essential point is as to the principles of law which were necessarily used by the court in order logically to reach the result arrived at. Thus a principle may be possible of statement in any one of a dozen collocations of words. In fact it may have been stated by the judge in language which was broader or not broad enough to support the decree which he rendered. This is immaterial. The precedent or law declared in the case is contained in what is known as the *ratio decidendi* of the case, that is, the legal proposition which furnished the



logical basis for the decision that was rendered. Any doctrine that the court may have stated broader or narrower than this is an *obiter dictum* and without force as a judicial precedent.

Develop-  
ment of  
the Common  
Law

New situations give rise to new legal principles, and old principles obtain development and sometimes modification in the light of altered conditions and changed social, political, and economic needs and convictions. In other words, the Common Law develops in the main by strictly logical processes, the new principle being drawn out of the older one or established in analogy to it; although it is not to be denied that the courts sometimes bend their reasoning or even depart wholly from the deductive path in order to reach a result which they deem desirable in the particular case or to establish a new doctrine which they consider to be socially and politically just and expedient. But, whether by rigorous logic or by more arbitrary determination, it is by the courts that the Common Law is created.

Its Codifi-  
cation

This Common Law is, of course, subject to repeal or amendment at the will of the formal law-making body of the State, and during recent years, the legislatures of all the states have been industrious in their statute-making, but it still remains true that the great part of the private law of Anglo-Saxon countries consists of principles which have been declared and elaborated in the decisions of the courts. This is true even in those states which have enacted comprehensive statements of their law, termed Codes, for, in the main, the sections of these Codes but restate the older Common-Law doctrines.

Statutes

It is, however, to be observed, that when a law finds statement in a Statute, the function of the courts with reference to its interpretation and development becomes a quite different one from the power which it exercises in the determination of what the Common Law is as applied to a certain state of facts. The legal principle having received authoritative utterance in set words, the task of the



court in determining the principle stated by it is largely one of ascertaining the intent of the legislature, of grammatical construction and interpretation of the words and clauses that are employed, and not the logical one of determining the unformulated Common-Law principle within the scope of which the case is brought by the particular facts which it involves.

But even with regard to the interpretation of statute law, the range of judicial power is very great, for it is seldom that it is possible to employ language to which but one possible meaning can be attached, and especially is this true when the law has to be applied to conditions which the law-enacting body has not foreseen and could not foresee. Thus it is, indeed, that some writers are led to treat of legislative acts as but "sources" of the law rather than the law itself. Thus Professor Gray writes: "All the Law is judge-made law. The shape in which a statute is imposed upon the community as a guide of conduct is that statute as interpreted by the courts. The courts put life into the dead words of the State," and he quotes from Bishop Hoadley who said: "Nay, whoever hath an absolute authority to interpret any written or spoken law, it is he who is truly the law-giver to all intents and purposes, and not the person who first spoke and wrote them."<sup>1</sup>

As Sources  
of the Law

Power of  
interpreta-  
tion

In those States in which the courts have the power to hold void acts of the legislature which they, the courts, deem to be inconsistent with the provisions of the written constitution, the judicial branch is, of course, peculiarly influential by way of restrictive act at least in influencing the law-making authority and policies of the legislative branch and the exercise by the executive branch of the powers vested in it by the Constitution.

A measure presented to the legislature for enactment into law is known as a "Bill"; when it has obtained the

<sup>1</sup>Gray, *Nature and Sources of Law*, Sec. 276.

Parliament  
and Con-  
gress

approval of both Houses and of the Executive it is titled an "Act." Having taken its place among the other laws of the country it is known as a Statute. Thus in Great Britain, the Acts of the Parliament are known as "Statutes of the Realm." In the United States they are designated as Statutes at Large, and grouped into the two classes, Public and Private, the former relating to matters of general concern; the latter to particular persons or groups of persons. Thus an act granting certain privileges to an individual as, for example, granting to him a pension, or an act incorporating a company, is a private act. Acts may also be classified as permanent or temporary, according to whether they establish a rule that is to remain in force until repealed, or, by their terms, are limited in operation to a given period, or are of such a character that the acts authorized by them having been done, the possible application of the measure is exhausted.

Codifica-  
tion by  
Congress

In the United States in 1873 all the Statutes of a permanent character then in force were brought together in a single compilation in one large volume, somewhat revised, and have since been known as the Revised Statutes of the United States. A second edition of this revision was issued in 1878, and since then two supplements have been issued covering the periods 1874 to 1891 and 1892 to 1901. There have been no further revisions with the result that since 1901 the federal statutes are to be found in the volumes annually issued and known, as has been said, as Statutes at Large.<sup>1</sup> There have been enacted by Congress, however, several very comprehensive measures which have brought together and revised all the federal laws relating to certain subjects. Thus a few years ago the criminal laws of the United States were considerably revised,

<sup>1</sup>At the last session of the Sixty-sixth Congress the House of Representatives, under suspension of rules, passed H. R. 9389, "A Bill to consolidate, codify, revise, and reenact the general and permanent laws of the United States in force March 4, 1919." The bill was not considered in the Senate. The proposed code, which seems to be very carefully prepared, requires 10,747 sections and 1,251 pages of fine print.

reënacted as a single statute which is referred to as the Criminal Code of the United States.<sup>1</sup> Similarly there has been enacted a Judicial Code, covering the organization and powers and modes of operation of the federal courts.

Besides Acts, which, while under consideration in Congress, are styled Bills, measures come before Congress in the form of resolutions, which are known as a Joint Resolution, a Concurrent Resolution, or simply as a Resolution of the particular House which adopted it.

Resolu-  
tions

As regards this last kind of action, it is clear that many occasions arise where it is necessary and expedient that the House or the Senate should, as a body, put itself upon record as approving certain matters, or as authorizing something to be done which concerns only its own routine business, as, for example, that a certain special committee be established, or an inquiry undertaken, or a new rule of procedure adopted. These resolutions have, of course, legal force in that they prescribe action with reference to matters falling within the constitutional sphere of authority of the Houses concerned. But they are not laws since they lay down no rules or embody no commands binding upon anyone except the members of the House concerned, and they, therefore, find no place among the Statutes of the United States. Concurrent Resolutions are exactly similar to these Simple Resolutions, except that they relate to matters regarding which it is expedient or legally necessary that the common approval of both legislative branches should be obtained.<sup>2</sup>

Joint and  
Concurrent

Joint Resolutions are, however, of a quite different character. They result in the creation of laws in the

<sup>1</sup> 35 Stat. at L. 1088.

<sup>2</sup> Difficult questions as to the difference between Concurrent and Joint resolutions were raised by the action of the United States Senate in declaring, in its first reservation to the Treaty of Peace, that "notice of withdrawal by the United States [from the League of Nations] may be given by Concurrent Resolution of the Congress," *i. e.*, by a resolution not submitted to the President. For a full discussion of the problem, see Quincy Wright, "Validity of the Proposed Reservations to the Peace Treaty," *Columbia Law Review*, Vol. XX, p. 121 (February, 1920).



**Their  
rationale**

strictest sense of the term, and, in fact it is often difficult to see why they should have originated as resolutions rather than as bills, and resulted in joint resolutions rather than acts or statutes. They require the approval of the President before going into effect, and are published among the Statutes at Large.

There seems to be some reason why a measure should be styled a Joint Resolution rather than a Statute, when it provides simply that a certain thing be done, as, for example, that Texas be admitted as a state of the Union, and does not lay down any general rule of action; but it will be found that there are many instances in which there is, in substance, nothing whatever to distinguish a Joint Resolution from a Statute.

**The Ordinance-Making Power**

One further observation with reference to the law-making powers of the formal legislative organ of a government is necessary. It is essential that a certain amount of authority be given to those who are to enforce an enacted measure of public policy, to issue rules and regulations governing the application of the general principle, legislatively determined, to particular circumstances and conditions of fact. These rules and regulations are termed ordinances, and have the full force of laws. Under some systems of constitutional law, that of the United States being of this character, the executive is not empowered to issue these ordinances except in pursuance of statutory powers giving the authorization with reference to the specific matters dealt with. Thus, for example, although the Federal Constitution empowers the President to "take care that the laws be faithfully executed," it has been determined by the Supreme Court that this gives to him no authority to issue ordinances, or, in fact, any rules or regulations having the force of law, except in pursuance of some power specifically given him by the Constitution, or delegated to him by act of Congress.

Contrasted with this American principle is that found in



constitutional monarchies, according to which the King, or Emperor, is conceived of as the original source of all law-making power and therefore as possessing an independent right to issue legally binding orders except in so far as he has agreed to share this right with the legislative or other organs of government. The result is that the ruler is conceded to have a wide ordinance-making power which is limited only by the principle that he may not establish rules which are in violation of laws already upon the statute books or of specific constitutional provisions. Even under the English constitutional system the so-called "prerogative powers" of the King, that is, those which he may exercise without first obtaining the approval of his parliament, are very extensive. Constitutional practice has, however, firmly fixed the rule that he shall not exercise these prerogative powers except with the approval, or at the suggestion, of his ministers who are responsible to the parliament for the advice which they thus give. How extensive, however, this ordinance-making power of the King still is, is shown in the following often quoted words of Walter Bagehot, taken from his famous essay, *The English Constitution*, published more than a half century ago, but still authoritative:

Powers of  
the English  
Crown

It would very much surprise people if they were only told how many things the Queen could do without consulting Parliament. . . . Not to mention other things, she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the General Commanding-in-Chief downwards; she could dismiss all the sailors, too; she could sell all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the United Kingdom a 'university'; she could dismiss most of the civil servants; she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government.<sup>1</sup>

Bagehot's  
description

<sup>1</sup>2nd (Amer.) ed., p. 31.

And to this enumeration President Lowell adds:

The Crown could appoint bishops, and in many places clergymen, whose doctrines were repulsive to their flocks, could cause every dog to be muzzled, every pauper to eat leeks, every child in the public elementary schools to study Welsh; and could make all local improvements, such as tramways and electric light, well-nigh impossible.<sup>1</sup>

No Power  
to complete  
laws

In one important respect, however, the British ruler does not possess an authority that may be exercised by most of the kings of Europe and even by the President of the French Republic; that is, without express statutory authority, to issue ordinances for the completing of the operative details of laws passed by the legislature. "This does not mean," however, as President Lowell points out, "that it [the Crown] cannot make regulations for the conduct of affairs by its own servants, by Orders in Council, for example, establishing the regulations for the management of the Army, or prescribing examinations for entrance to the civil service. These are merely rules such as any private employer might make in his own business, and differ entirely in their nature from ordinances which have the force of law, and are binding quite apart from any contract of employment."<sup>2</sup>

Without  
Parlia-  
mentary  
authority

In order to issue Ordinances binding upon all persons, and therefore with the force of laws, the Crown must have received, as has been said, authority from the Parliament. This has been liberally granted, with a result that the so-called "statutory orders" thus issued are very numerous. In some cases, it is provided that the executive order shall be submitted to Parliament for its approval. Regulations of this character are known as "Provisional Orders." Even as to Statutory Orders the Parliament often reserves the right to say, within a certain time, whether they shall go into effect, or, if they have already gone into effect, whether they shall be annulled.

<sup>1</sup> *The Government of England*, (1st Ed.), Vol. I, p. 24.

<sup>2</sup> *The Government of England*, Vol. I, p. 19.

From the preceding paragraphs it is learned that if, as in the United States and Great Britain, there is not conceded to the executive an inherent right to issue orders having the force of general laws, none the less, as a practical proposition, it is often necessary for the legislature expressly to grant the power to issue such rules and regulations as are needed for carrying out into their practical details the more general provisions of legislative enactments. In other words, just as the Constitution itself provides only an outline of government, leaving it to Congress, by legislation, to fill in the necessary details; so Congress, in very many cases, is, by practical necessity, compelled to state its policies in general terms, leaving their details to be determined by executive ordinances or administrative determinations.

Policy of  
Congress

Generally speaking, in the modern constitutional States of the world, with the exception of the United States and its constituent states, the policy has been for the legislative body to frame its enactments in very broad terms, thus leaving wide discretionary powers with the executive as to the ordinances he shall issue in order to give effect to the policies legislatively adopted. That this policy is a very wise one there can be no doubt, for it stands to reason that the officials who have to execute a policy are in a much better position to know what is expedient or just under the day-to-day conditions which confront them, than can possibly be the legislative branch, which is not brought into actual touch with concrete conditions and face to face with the practical problems of administration as they arise from day to day. Special ordinances thus have the two great advantages over legislative enactments, that they can be made to meet special conditions, and that they can be easily altered when new conditions arise, or when, for any reason their operation is found to be inexpedient.<sup>1</sup>

Advantages of  
ordinances

<sup>1</sup>On the delegation of legislative power see McIlwain, *The High Court of Parliament and Its Supremacy*, p. 331.



The Constitutional difficulty in U. S.

In America, partly on grounds of policy, and partly because of the constitutional objection to the re-delegation of delegated power,<sup>1</sup> there has been an unwillingness upon the part of Congress and of the legislatures in the states to grant to executive agents the discretionary authority that they should have, with reference to issuing ordinances or administrative orders, if administrative efficiency is to be secured. This legislative unwillingness to delegate law-making power has, however, not been so marked during recent years, as it formerly was, and especially is this true in the Federal Government. The very complexity of the problems which have been presented to Congress has forced that body to delegate wide discretionary power either to the President or to administrative bodies of its own creation. After the entrance of the United States into the World War, as is well known, the Congress was compelled not simply to place huge sums of money in the hands of the President and other officials to expend at their discretion, but to grant to them extraordinarily broad discretionary administrative powers. As a single, and very extreme, instance of this may be cited the so-called Overman Act of May 20, 1918, giving the President very broad powers with regard to the coördination and consolidation of government bureaus, commissions, and agencies.<sup>2</sup>

The Overman Act

The Government of Dependencies

But even before the war, the liberal legislative policy of Congress was in evidence. Thus for several years after Porto Rico and the Philippine Islands were annexed, their government was, with few restrictions, placed wholly in the hands of the President. This is the present status of the Panama Canal Zone, and even for Porto Rico and the Philippines, at the present time, Congress enacts only occasional laws, the administration of those islands being delegated to specially established "insular" governments. Or, to take one other example, but one referring to a matter

<sup>1</sup>See Willoughby, *Constitutional Law of the United States*, Vol. II, p. 1317.

<sup>2</sup>The text of this important statute is given in the Appendix, below.



of vast importance, Congress, in the exercise of its power to regulate commerce among the states, has contented itself with laying down the very broad principle that interstate railway rates shall be just and reasonable, leaving it to an administrative body, the Interstate Commerce Commission, to determine, in each particular case, what shall be deemed a just and reasonable charge.

American constitutional jurisprudence, however, imposes two limitations upon the power of Congress or of state legislatures to delegate discretionary powers to executive or administrative agencies.

Limitations  
on legisla-  
tive power

The first of these is that the determination of the general public policy must be made by the legislature itself, that is, the real legislative power must be exercised by the organ in which it is vested by the Constitution. Thus, with reference to the matter of interstate railway rates, above referred to, the policy that they should be subject to legal regulation and that they should be "just and reasonable" had to be fixed by Congress. The enforcement of this policy, involving its application to concrete cases, could be and was delegated to an executive organ. This illustration shows, however, that this limiting constitutional principle is easily satisfied, and makes constitutionally valid as broad discretionary administrative powers as it is likely that expediency can possibly demand.

General  
Policy

The second constitutional principle, above referred to, limiting the power of American legislatures to delegate discretionary powers to administrative agents, is that the discretion thus authorized must be one guided by conditions of fact and not dictated by the purely personal or arbitrary judgment of the agent exercising it. Thus, in a leading case in which it was held void a legislative act which had attempted to vest in an administrative agent a personal and arbitrary power to say whether buildings should be used for certain purposes, the Supreme Court of the United States said:

Purely  
arbitrary  
discretion

"The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being of the essence of slavery itself." Referring to certain city ordinances that had been issued, the Court continued: "They seem intended to confer and actually do confer, not a discretion upon consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not as to places but as to persons. . . . The power as given to them [the administrative agents] is not confided to their discretion in the legal sense of the word, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint."<sup>1</sup>

To the issuance of one kind of ordinances, namely, those which define acts as criminal and attach penal consequence to their commission, American courts have been loath to give sanction. Only where the legislature itself has clearly and specifically provided that a violation of the orders which the administrative officials are authorized to issue shall be deemed criminal and certain penalties attached to their commission, will the courts uphold them. Thus, as was said in one case:

Executive  
power in  
criminal  
matters

Regulations prescribed by the President and by the heads of departments under authority granted by Congress may be regulations prescribed by law, so as lawfully to support acts done under them in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do so a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.<sup>2</sup>

<sup>1</sup>*Yick Wo v. Hopkins*, 118 U. S. 356 (1886). Another interesting case is that of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902).

<sup>2</sup>*United States v. Eaton*, 144 U. S. 677 (1898), but see *U. S. v. Grimaud*, 220 U. S. 506 (1911).

Besides the delegation to executive agencies of the right to issue rules and regulations having the force of law, the legislatures of all states of any considerable size delegate to local governments—or the written constitutions do this for them—authority to issue special orders or laws relating to their special areas. Under federal forms of government the field for general legislation is divided between the central legislature and the legislatures of the constituent states of the union or federation, and these states, in turn, delegate self-governing powers to their local governments.<sup>1</sup> And, where colonies are held, it is usual for the sovereign government to grant autonomous powers to the governments established in them; and in empires like the British, the Imperial Parliament has retained for itself such slight legislative control over the local affairs of certain of its possessions, known as “dominions,” that it is little more than a legal fiction to say that it has any control at all.<sup>2</sup>

The  
British  
Common-  
wealth

In the paragraphs which have gone before it has been seen that only to a limited extent does the legislative branch of a government furnish, by its formal enactments, the laws of a country, and, even as to the measures which it does enact there remains to be determined the extent to which its own will may be said to find embodiment in these statutes. This is a question which will be considered later. Furthermore, it will be seen, in many States the accepted theory is that, as a purely legal proposition, the real decisive law-making act is not that of the legislative chambers at all, but of the monarch when he gives his assent to the measures which his parliament presents to him;—that the function of the parliament has been but to fix the form and substance of a proposition of law which

The Mon-  
archical  
Theory

<sup>1</sup>For a discussion of the delegation of legislative power to local governments as an exception to the rule against re-delegating legislative power, see Cooley, *Constitutional Limitations*, pp. 166, 264.

<sup>2</sup>For a very brief but clear statement, see A. B. Keith, *Dominion Home Rule in Practice* (1921). A more elaborate discussion is Hall, *The British Commonwealth of Nations* (1920).

is not transmuted into actual law until he has exercised with reference to it his sole and supreme legislative will.

#### TOPICS FOR FURTHER INVESTIGATION

The Powers of the English Crown.—Ogg, *The Governments of Europe*; Marriott, *English Political Institutions*; Lowell, *The Government of England*; Bagehot, *The English Constitution*.

The Delegation of Legislative Power.—McIlwain, *The High Court of Parliament and its Supremacy*; Cooley, *Constitutional Limitations*; Willoughby, *Constitutional Law of the United States*; Fairlie, "Administrative Legislation," *Michigan Law Review*, January, 1920.

Legislatures and Courts as Law Makers.—Gray, *The Nature and Sources of Law*; Holland, *Jurisprudence*; Bryce, *Studies in History and Jurisprudence*; Maine, *Ancient Law and Early History of Institutions*; Pollock, *First Book of Jurisprudence*; Jenks, *Law and Politics in the Middle Ages*; Carter, *Law: Its Origin, Growth, and Function*; Willoughby, *The Nature of the State*.

The Drafting of Statutes.—Freund, *Standards of American Legislation*; Jones, *Statute Law-Making*; Ilbert, *The Mechanics of Law-Making and Legislative Methods and Forms*; McCarthy, *The Wisconsin Idea*.



## CHAPTER XII

### THE LEGISLATURE AS A CRITIC OF THE EXECUTIVE, AS AN ORGAN OF PUBLICITY, AND AS AN ELECTORAL BODY

IN THE preceding chapter the legislature has been dealt with as a law-making organ. We turn now to a consideration of it as a critic of the executive, and as an organ of publicity and political education.

It has been earlier pointed out that a popular government is one whose policies are subject to the control of public opinion. This principle applies not only as regards the matter of determining the policies to be pursued, but as regards the manner in which they are carried into effect. The government being one that is for the people as well as by the people, it is their right to demand not only that their orders shall be efficiently and honestly executed, but in good faith, that is, in conformity with the legislative purpose and intent.

As regards honesty, this may be in part secured by the care which is taken in appointing or electing the administrative agents of government and by a rigid enforcement of the criminal law. As regards efficiency this too may be in part secured by selecting only competent officials, and by providing a well organized administrative system employing proper administrative methods.

But, human nature being such as it is, no mode of selection of public officials, however excellent, and no system of administrative organization and operation, however perfect, can render unnecessary the maintenance by the people of a constant supervision over, and scrutiny of, the

Popular  
Government  
subject to  
Public  
Opinion

Need for  
oversight  
of Execu-  
tive

official acts of the executive and administrative branches of the government. And it does not need to be said that the greater the discretionary powers vested in executive agents, the greater is there the need for this continuous supervision.

This need has been recognized in all representative governments and it is but natural that the people should vest in its assembly of elected representatives this duty of guarding its interests. Thus we come to the function of the legislature in all representative governments, as a critic of the executive.

Legislature  
as critic

In order that a legislative body may function efficiently as an organ of criticism of the executive it is necessary that means should be provided whereby the actions of the executive may be made known, and with reasonable promptness, after they have been committed. It is thus indispensable that all administrative officials be required to make full and detailed periodical reports of all that they have done, and, furthermore, be compelled to submit to such special investigations as may be ordered, or to such questioning as may be made upon the floors of the legislative chambers.

This necessity for publicity explains the provision of the United States Constitution that, "A regular statement and account of the receipts and expenditures of all public money shall be published from time to time," and the many requirements found in the Statutes at Large with regard to the annual administrative reports to be made to Congress by the several administrative services, and as to the facts that shall be set forth in such reports.

Discussion  
by Congress  
of griev-  
ances

In the American Congress special investigations into the conduct of certain offices, or as to the manner in which particular laws have been executed, are also frequent; and it is not unusual for congressional committees to make special inquiries of, or to interrogate personally, officials of the government with regard to the manner in which

they have fulfilled the duties laid upon them by law, and, as a result of these investigations, severe criticism of these officials is sometimes expressed in the printed committee reports or in resolutions adopted by one or both of the Houses of Congress. Formal censure of this sort has, upon occasion, been visited upon the President himself. And, of course, in the debates in Congress, severe criticism of executive officials is of frequent occurrence.<sup>1</sup>

Legislative  
censure

In order that legislative chambers may be free to criticize it is generally provided in all written constitutions, and in England as a matter of law, that their members shall not be questioned or held responsible in actions of libel or slander in the courts of law for what they may say upon the floors or in the committee meetings of their respective chambers.

In governments of the responsible cabinet type the legislatures exercise a supervision over the executive operations by what is known as "interpellation."<sup>2</sup> This important legislative practice plays a part under the English parliamentary system different from that which it does in France and a few words with regard to this difference will be appropriate.

Interpella-  
tions

Under the English system the right of interpellating the members of the Ministry is surrounded by stringent rules governing the form that questions shall take, the times when they may be made, and the character of the discussion which may be had upon them.<sup>3</sup> Notices of

Their  
utility in  
England

<sup>1</sup>In the American Congress, criticism of the executive can be indulged in at almost any time. Occasionally rules reported by the Rules Committee for the consideration of measures provide that the debate must be germane, but even this limitation is liberally interpreted. In the House of Commons, criticism is chiefly indulged in in the debate on supply, and the objection is made that the activities of departments are discussed to the exclusion of the justification of the estimates. Grievance before supply may be the rule in the Commons, but it is grievance all the time in the House of Representatives. In the Senate there are no limitations as to germaneness.

<sup>2</sup>On the general subject of interpellations, see Bloch, *Régime Parlementaire*, and Onimus, *Questions et Interpellations*.

<sup>3</sup>Lowell, *The Government of England*, Vol. I, p. 331. It should be remembered that France borrowed the English form of "question" with few material changes.



Oral and  
written  
answers

questions proposed to be asked must be given by members in writing to the Clerk of the House, and without reading them *viva voce* in the House unless the previous consent of the Speaker has been obtained. If an oral, rather than a written answer, is desired, this must be indicated, and notice that it is to be made must be given at least a day before the answer is asked to be given. The questions can ask only for statements of fact or of opinion. They cannot be argumentative in form and cannot be so phrased as to imply a criticism of the persons addressed or of any other member of the "government." Their aim is to elicit information,<sup>1</sup> and upon this information a criticism may be later based. But the question itself is not allowed to have this effect. No debate is permitted upon these questions, although, if the answer is not clearly expressed or does not cover the point involved, further questions may be asked. It is always within the right of the one who is questioned to say that public considerations make it inexpedient to give the information which is requested, but it is clear that an attempt to exercise this right of secrecy in improper cases necessarily arouses a suspicion that there has been

but the French deputy prefers the "interpellation," which "is itself a question, but a question that precipitates a discussion and a vote." Sait, *Government and Politics of France*, p. 236.

<sup>1</sup>The Rt. Hon. C. F. G. Masterman, an experienced parliamentarian, thinks that questions in the House of Commons do good, even though trivial ones are asked, Ministers dissimulate, and Parliament can rarely obtain the truth when the Minister wishes that the truth shall not be known.

"Indeed, in one recent Committee's examination of alleged harsh treatment of a Government servant, it was revealed that the Minister himself had laid down the definite distinction between 'truth' in the abstract and 'Government truth' as modified for a Parliamentary answer. . . .

"A Minister may indeed sit dumb and glowering in face of his persecutors, and no power can make him reply; as did Mr. Churchill on one historic occasion, when, as all the Members were shouting 'Answer, answer!' the Speaker pacified the rising tumult by informing the House that it was impossible to draw blood out of a stone. Or he may take refuge in the reply: 'I must have notice of that question' as a late Under-Secretary for Foreign Affairs was instructed to do by his Chief who was in the House of Lords, and thus replied so automatically that the time came when a member inquired with an air of innocence: 'Are we to understand that the answer just given means Yes or No?' To which the Minister replied: 'I must have notice of that question,' to his subsequent confusion and the no small enjoyment of his colleagues." Masterman, *How England is Governed*, p. 202.



some unwise or improper conduct which it is desired to conceal. There being no debate, there is no vote of the House taken after the question has been put and answered.

In France the right of interpellation is a much more drastic implement employed by the Chamber in its control of the Ministry. Upon this point we may quote from an excellent article by Professor J. W. Garner.<sup>1</sup> After referring to the distortion of the English Cabinet system by the excessive rôle which the French Chambers insist upon playing both in legislation and administration, Professor Garner says:

Their  
abuse in  
France

One of the worst forms of abuse which the interference of the Chambers has taken in recent years is that of indiscriminate interpellation of the Ministers. Originally intended as a form of interrogating the Ministers upon their general policies and of calling them to account, it has degenerated into a means of harassing them and of consuming the time of the legislature in the discussion of secondary and even trivial matters which in the English House of Commons would be regarded as quite beneath the dignity of the Chamber.

These questions, when made and answered, are permitted to lead to debates which are concluded by a vote of the Chamber which, when it voices a criticism of the Ministry, often leads to its downfall, and thus comparatively trivial matters sometimes lead to the resignation of the Cabinet.

In the description which has been given of the legislature as an organ of criticism of the executive, it has been pointed out that it assumes the right to demand from all administrative agents full reports of their operations, in the form of periodical reports, and in response to special questioning. These reports and their special investigations and questioning, being almost always published, the legislature thus becomes an important instrumentality by means of which the people are kept currently and authentically informed regarding the acts of those in authority over

Congres-  
sional in-  
vestigations

<sup>1</sup>"Cabinet Government in France," *American Political Science Review*, August, 1914, (Vol. VII, p. 353.)

them.<sup>1</sup> In addition it is the general rule for legislatures to admit the public to their meetings and to publish a more or less complete account of their own proceedings. Only upon special occasions are there held secret sessions of popularly elected legislative bodies.<sup>2</sup>

Government documents

The Congress of the United States publishes an official *Congressional Record* which, in daily form, contains a verbatim account of the transactions of both Houses. Indeed it does more than this, for the *Record* contains much

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<sup>1</sup>During the Sixty-sixth Congress, regular or special committees investigated the following matters: the price of coal; socialist activities in the Federal Trade Commission; the strike of railroad employees; the Peace Treaty "leak"; reparation by Mexico; the status of C. A. K. Martens, of Russia; the shortage and price of sugar; the wheat situation and transportation problems in the Southwest; the amount and grades of cotton and wheat held in the United States; the whole question of public building and grounds; the suspension of Miss Alice Wood, a District of Columbia school teacher; rents and the high cost of living in the District of Columbia; bread prices; the activities of government departments in public health matters; the eligibility of Victor Berger to membership in the House of Representatives; War Department contracts and expenditures; budget systems; the Shipping Board and Fleet Corporation; the public school system in the District of Columbia; housing conditions and building construction; the Michigan senatorial election case; campaign expenditures of candidates for the presidential nominations; expenditures of the presidential candidates; the constitutionality of the Peace Treaty with France; war-risk insurance matters; the case of Robert A. Minor, alleged distributor of Russian propaganda, who was detained in France; action by the Attorney General on the Louisiana sugar situation; loans to foreign countries; illegal entry of aliens across the borders of the United States; deportation proceedings; loans by the Federal Reserve Board on wheat and other cereals; print-paper prices; speculation by United States Grain Corporation officials; cotton acreage; Canadian control of railroads in the United States; living condition of railroad trainmen who lie over between trips; mining conditions in Pennsylvania and West Virginia; coal cost to railroads; discrimination in prices paid for live stock; oil and petroleum prices; the price of shoes; animal feeds; loose-leaf tobacco prices; causes of the steel strike; the Federal Board for Vocational Education; conditions in the Virgin Islands; and what constitutes a "modern fighting navy."

This list is much longer than that of the Sixty-fifth Congress, because of the fact that Congress was Republican and the President Democratic, although, as will be seen from the enumeration, the purpose was not only to investigate the executive, but to secure information for the legislature. In addition to these investigations, which were actually held, nearly two hundred other inquiries were proposed, but not sanctioned by the chambers, and the regular committees, in the course of ordinary activities (hearings on appropriation bills, for example) probed into many executive matters.

<sup>2</sup>The proceedings of the German *Bundesrath* were not public, but this body was a legislative chamber in only a very qualified sense, and, of course, was not a popularly elected body. The United States Senate acts in secret, or, as it is called, "executive" session when it considers the approval of treaties or the confirmation of Presidential nominations. When so sitting, however, it is functioning as an executive rather than as a legislative body.

matter that is not actually spoken at all but is inserted by individual members under special "leave to print" given to them by their respective Houses. The United States Government, it may be observed, is probably the most liberal government of the world in the matter of issuing public reports and in distributing them either gratuitously or at a very small charge.

Closely related to the function of legislative bodies as organs of publicity, is their educative influence upon the people. In their debates and published reports most of the administrative problems of government are discussed and the merits *pro* and *contra* of the public policies adopted or urged for adoption by the government.<sup>1</sup> To the extent, then, that the people keep themselves informed regarding the proceedings of their legislature, or read the reports which they publish, an important process of popular education in matters political is being carried on.<sup>2</sup>

An important function which the legislature can and, under the responsible parliamentary type of government, does perform is the selection of those who are to exercise the real executive power of the State. Under the presidential form of government, as it is found in the United

Educative  
function of  
legislatures

<sup>1</sup> Cf. Bagehot, *The English Constitution*, and Wilson, *Congressional Government* for a discussion of the educative influences of the English and American systems.

<sup>2</sup> The inauguration of the committee system in England, with their proceedings in semi-obscurity, has gone far to reduce the importance of the House of Commons as an organ of publicity. At the same time Mr. Lloyd George's government has had very especial relations with the newspapers. That a good press is rather to be desired than great praise in the House of Commons, is evident from the manner in which important announcements are made in print rather than to the House. See Laski, "Mr. George and the Constitution," *The Nation* (London), October 23, 1920. Harold Cox, "The Power of the Press," *Edinburgh Review*, April, 1918, discusses the situation during the war.

In this connection it is interesting to recall a prophetic *dictum* of Disraeli (*Coningsby*):

"Political compromises are not to be tolerated except at periods of rude transition. An educated nation recoils from the imperfect vicariate of what is called representative government. Your House of Commons, that has absorbed all other powers in the State, will in all probability fall more rapidly than it rose. Public opinion has a more direct, a more comprehensive, a more efficient organ for its utterance than a body of men sectionally chosen. The printing-press absorbs the duties of the sovereign, the priest, the Parliament. It controls, it educates, it discusses." See above, p. 141, note.



Legislative  
choice of  
Executive

States, the Congress does not participate in the election of the President. But among its members are most of the political party leaders, and these, through the control which they have of the party machinery, dictate, in very large measure, who shall be the candidates for election to the Presidency.<sup>1</sup> The President decides who shall be the members of his Cabinet, but here, again, the range of his choice is much restricted by the wishes of the political leaders, many of whom are in Congress. And with regard to all the other higher administrative appointments which he makes, the approval of the Senate is constitutionally required, and what is termed "senatorial courtesy" has hardened into a practically inflexible rule that that body will not approve of any appointments made by the President which do not meet with the favor of the representatives in Congress from the same political party as the President who represent the state or congressional district where are located the offices to which the appointments are made.

France and  
Switzerland

In France the President is elected directly by the two Chambers of Parliament meeting in joint session; and, of course, its real rulers, the members of the Cabinet, are appointed by the Premier subject to the approval of the Chambers and remain in authority only so long as those bodies see fit. In Switzerland the members of the Federal Council, which is at the head of the executive, are elected by each Federal Assembly, nominally for three years, but in fact only for the term of the Lower House, for if that body is dissolved, the new National Council elects a new Federal Council. This executive council, as is elsewhere pointed out, has practically no independent policy-forming powers but acts as an executive committee of the parliament. In such countries as Prussia, the German Empire, and Japan, the executive

<sup>1</sup>The manner of Senator Harding's nomination by the Republican convention is a recent and striking illustration of the truth of this statement.



has been so dominant that the legislature has had no considerable influence as an electoral body.

It is in England and such of her Dominions as Canada, Australia, and South Africa, which have adopted her parliamentary system, that the lower house of the legislature stands out most conspicuously as the organ for the selection of the real executive rulers of the country. In England, indeed, it may be truthfully said that in most cases the only express mandate which members of the House of Commons receive from their several constituencies is to maintain a given political party or Ministry in power. The legislative policies which are to be adopted the electorate is commonly willing to leave to this Ministry, subject only to the supervision and possible, though not very effective, control of the House of Commons.

Where the English system of parliamentary government prevails, the power to criticize is supported by an effective power to punish politically, that is, to deprive of office, those whose actions come under its serious disapproval. And even in such countries as Japan, Prussia, and Germany, the legislative objection to certain advisers of the King or Emperor has occasionally been sufficient to bring about their resignation or removal from office. In the United States, the Congress, and in the states of the Union, their several legislatures, while having full powers of criticism, are not able directly to affect the tenures of office of executive officials—except, of course, by way of impeachment, which is a very clumsy instrument and can only be employed upon exceptional occasions. But indirectly their criticism is always of great influence, since it is able to hold the executive up to the bar of public opinion and thus to affect the political fortunes of those against whom its shafts of criticism are directed.

**The British  
Dominions**

**Cabinet and  
Presidential  
Systems**

## TOPICS FOR FURTHER INVESTIGATION

Methods of Congressional Criticism.—Bryce, *The American Commonwealth*; Wilson, *Congressional Government*; Munro, *The Government of the United States*; *American Political Science Review*, Vol. XIII. p. 25; Vol. XIV. pp. 74, 659.

The Value of Interpellations.—Sait, *Government and Politics of France*; Lowell, *The Government of England*; Ogg, *The Governments of Europe*; Ford, *The Cost of our National Government and The Rise and Growth of American Politics*; Wilson, *Congressional Government*; Garner, "Cabinet Government in France," *American Political Science Review*, Vol. VII, p. 353 (August, 1914), and references.

The Press and the English Government.—See references on pp. 117, 219, above, and the references on the English War Cabinet below, Chapter XVII.

## CHAPTER XIII

### THE LEGISLATURE AS A POLICY- FORMING ORGAN

IN THIS chapter will be considered the most important of all the functions of the legislative body, for upon the manner in which it is performed depends the real character of the representative government that is to exist. We have already discussed the part that can be played by the legislature in the creation of law. This, however, was a matter of form as well as of substance, and a narrower problem than the function now to be discussed. Here we shall be concerned with the part that can or should be played by the legislative chambers in fixing the policies that the government is to pursue.

**Govern-  
mental  
policies**

Not all state policies find statement in the statutes. This is especially true of foreign relations. To a very considerable extent the determination of these relations is, in all countries, in the discretionary power of the executive—in strong constitutional monarchies, in the hands of the King and his ministers; in Great Britain and France, in the Cabinet; and in the United States, in the President.

Under the American constitutional system the Federal Government is given exclusive and plenary authority over foreign relations, which is shared, however, by Congress, the President, and the Senate. Congress is given the power, among others, to punish offences against the law of nations, to declare war, to grant letters of marque and reprisal, to make rules concerning captures on land and sea, to raise armies, to provide a navy, and to enact any regulations that may be necessary and proper for carrying

**Control of  
Foreign Re-  
lations**

these powers into effect. The President is given complete executive authority: he is commander-in-chief of the army and navy and he makes treaties and appoints ambassadors with the concurrence of the Senate, whose power is limited to these two cases in which its approval is necessary to validate the President's acts. This constitutional authority, as is evident, is both incomplete and none too definitely parcelled out; nothing is said about neutral rights, the recognition of new governments, the abrogation of treaties, or the conclusion of agreements not so formal as to require the sanction of the Senate. And while Congress has the power to declare war, if a treaty of alliance required the United States to take up arms, this obligation could be met only by the concurrence of the House of Representatives. Nevertheless, the gaps in the constitutional delegation of powers have been filled, says Professor Corwin, "by the theory that the control of foreign relations is in its nature an executive function and one, therefore, which belongs to the President in the absence of specific constitutional provision to the contrary."<sup>1</sup> When war broke out in 1793 between France and England, Washington issued a proclamation of neutrality which was bitterly attacked by French sympathizers on the ground that he had exceeded his constitutional authority. An exhaustive debate on the legal question was engaged in by Hamilton who approved and by Madison who objected to the President's action, but the former was theoretically correct and Washington's course has been followed without exception to the present day.<sup>2</sup> And it has developed that the initiative in foreign affairs, which the President possesses without restriction, is virtually the power to control them without any check except the indefinite one of public opinion. As Mr. Wilson wrote in 1908:

<sup>1</sup> Corwin, *The President's Control of Foreign Relations*, p. 5.

<sup>2</sup> The debate is reprinted by Professor Corwin.



The President cannot conclude a treaty with a foreign power without the consent of the Senate, but he may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the Government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed, the Government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.<sup>1</sup>

Mr. Wilson had no hesitancy in acting unreservedly on the principles he here expressed. Without consulting the Senate he withdrew the United States from participation in the six-power loan to China; on the question of Panama Canal Tolls he was forced to deal with Congress because the repeal of a statute was necessary, but he so mobilized public opinion that Congress was forced to do his bidding. The Mexican policy, whatever we may think of its success, was Mr. Wilson's own; he reported to Congress in his messages, and when necessary, asked for authority to intervene. Probably a majority in Congress disapproved of the President's policy so far as they understood it, but the authority to occupy Vera Cruz was granted. Later developments—the mediation with Argentina, Brazil, and Chile at Niagara, the recognition of Carranza—were governed solely by Mr. Wilson's wishes. With regard to Pan-America the beginnings of an *entente cordiale* were laid, while at the same time a strong hand was manifested in Nicaragua, Haiti, and San Domingo, where revolutions were being attempted. The Senate was consulted only when treaties were necessary and Mr. Wilson was not overly punctilious in asking the joinder of the Senate. The Lansing-Ishii agreement, under which the United States recognized special Japanese rights in China, was agreed to by the President without consulting the other branch of the treaty-making authority.<sup>2</sup>

President  
Wilson's  
theories

Executive  
agreements

<sup>1</sup>*Constitutional Government in the United States*, p. 77.

<sup>2</sup>For the division of power between the President and the Senate, see Corwin, *The President's Control of Foreign Relations*, and Willoughby, *Constitutional Law of the United States*.

Diplomacy  
of the War

When the war came, President Wilson dictated the course to be pursued by the United States: our proclamations of neutrality, our silence over the rape of Belgium and succeeding violations of international law so far as they did not affect our rights, the policy pursued toward England and Germany to persuade them to relinquish their restrictions upon American commerce—all represented the will of an executive who was not responsible to the people. Had he desired he could have led the country into war when the *Lusitania* was sunk; the crime of the *Sussex* in April, 1916, could have likewise been made a *casus belli* that would probably have been approved by the American people. The proposals of peace in December, 1916, were sent without consultation with any except perhaps a few intimate friends—European governments were communicated with through Colonel House, Mr. Wilson's closest friend and adviser: the magnificent address of January 22, 1917, announcing the programme that America would stand for at the settlement and which, if satisfactory, she would pledge her faith and strength to secure, was made, indeed, to the Senate "as the council associated with me in the final determination of our international obligations," but it was President Wilson's own policy. He broke off diplomatic relations with Germany, reporting the fact to Congress, but not asking for or being compelled to secure approval. Later in the month, Mr. Wilson desired to arm American ships; the Senate rules prevented him from securing this authority before the end of the session, but he found it in an old statute. Then came the declaration of war, made by Congress as soon as he asked it. No formal alliance was entered into by the United States and the other nations fighting Germany; semi-officially it was stated that the United States looked on the Entente Powers as "co-belligerents" rather than "allies," and that there was a "gentlemen's agreement" rather than a formal document. The extent of diplomatic coöperation with the

No legisla-  
tive control

"co-belligerents"; the terms of peace that the United States would accept; the pretence of not declaring war against Turkey and Bulgaria—all depended on the President. Mr. Lansing has adequately outlined the constitutional authority of the President with respect to the negotiation of a peace treaty.<sup>1</sup> American foreign policy is conducted under conditions that are thoroughly undemocratic; with few international problems to be settled, the absolute control of foreign affairs by the President was not alarming, but the conduct of diplomacy is now more reminiscent of the Stuart kings than of twentieth-century democracy. Nor is Mr. Wilson alone responsible. He simply accentuated a tendency which was already existent. The reader of Thayer's *Life of John Hay* or Roosevelt's *Autobiography* will have no difficulty in discovering incidents to match those which show Mr. Wilson's untrammelled control of American foreign policy.<sup>2</sup>

Autocracy of  
Executive  
Power

In Great Britain, according to constitutional theory, no treaty need be submitted for approval to either House of Parliament, although secret agreements are probably obsolete and the day is past when a Ministry will refuse to allow a formal vote by the Commons, when debate is desired. A binding precedent was set by the procedure on the treaty with Germany.<sup>3</sup> But the English House of Commons has not of recent years been very much interested in foreign affairs,<sup>4</sup> and the House has never insisted on having a foreign-affairs committee to examine the day-

Control of  
Foreign  
Policy in  
England

<sup>1</sup>*The Peace Negotiations*. There can be as much secrecy as under European systems. Consider, for example, the attitude of the United States toward Poland's adventure against the Bolsheviki in the summer of 1920.

<sup>2</sup>For an interesting discussion of the treaty-making king as the model of the American President, see Sir Henry Maine, *Popular Government*.

<sup>3</sup>For very interesting questions concerning imperial control in foreign affairs and the consultation of dominion governments, see Keith, *Dominion Home Rule in Practice*, Chapter IV.

<sup>4</sup>Candidates for Parliament were warned not to discuss international matters since there was little interest in them and there was danger of taking a wrong line. See Gilbert Murray, *Faith, War, and Policy*, Chapter VI.



by-day conduct of diplomacy—a matter of far more importance than the ratification of treaties.<sup>1</sup>

France,  
Germany,  
and Japan

In France, the Parliament does not grant, in practice, so much independence of action to the Cabinet as is granted by the British Parliament to the King's ministers; in the German Empire, the popularly elected *Reichstag* had a minimum of influence and control in foreign affairs, this influence and control being exercised by the *Bundesrath* and the Kaiser. In Japan, also, the legislative body plays, as such, no important part in the field of international politics.

It may be said, then, that the legislative branches of modern constitutional governments are not policy-forming organs as regards foreign affairs. Only when a government, in order to carry out a foreign policy, is obliged to obtain an appropriation of money, or to obtain auxiliary legislation, are the chambers able to exert a controlling influence. And even this control is not so great as it might seem, since, its government having formally entered into a treaty undertaking with a foreign power, the moral obligation upon the legislature to supply the funds or legislation in order to carry it out in good faith, is so strong that it is scarcely possible to resist it. Even with regard to such a vitally important matter as to whether the nation shall declare war against a foreign power, the independence of action of the legislature is very slight, even though it be constitutionally provided that its assent is necessary to

Power to  
declare  
war

<sup>1</sup>There is no adequate discussion in English of popular control of foreign policy. Two French monographs—S. R. Chow, *Le Contrôle parlementaire de la Politique en Angleterre, en France, et aux États-Unis* (Paris, 1920) and Barthélemy, *Démocratie et la Politique étrangère* (Paris, 1917) are probably the best; and, indeed, most is to be learned from the procedure in France where the legislative commissions on foreign affairs really exert a control over the executive. Lord Bryce's discussion (*Modern Democracies*, Chapter LXI) is suggestive but very general.

The following books, however, will be of value: Dickinson, *The Choice before Us*; Neilson, *How Diplomats Make War*; Morel, *Ten Years of Secret Diplomacy*; Ponsonby, *Democracy and Diplomacy* (with an appendix reprinting extracts from the well-known parliamentary paper with regard to the treatment of international questions by European Countries and the United States, Miscellaneous, No. 5, 1912. (C.d. 6102); and Myers, "Legislatures and Foreign Relations," *American Political Science Review*, Vol XI, p. 643.



validate such a declaration. For, as has been already said, the executive has it within his power so to conduct foreign relations, and so to commit the government, that when, in order to uphold the policies or principles which he has announced, he asks that war be declared, there is seldom any real choice left to the legislature.

A wrong impression might, however, be left with regard to this whole matter, if it were not pointed out that, though the legislatures in modern constitutional governments play no important affirmative part in fixing foreign policies, they none the less exert some restraining influence. In those countries where what is termed responsible parliamentary government exists, that is, where the conduct of public affairs is in the hands of ministers who are able to remain in office only so long as they can retain the confidence and support of the legislative chambers, it necessarily results that these ministers will be guided by the support which they believe they can obtain from these chambers for the foreign policies they adopt. They know that the time will come when they must successfully defend them if they are to remain in power. And, under the presidential form of government, such as prevails in the United States, although the President cannot be forced to resign because of a disapproval by Congress of the policies he has adopted, he knows that, after all, he is but a representative of his people, and that at the next presidential election they will pass judgment upon him or his party, or both, for the policies that have been pursued.

In domestic affairs, public policies find their formal sanction, as has been said, in the enactments of the legislature, which, when they have received executive approval and promulgation, are termed Statutes. And even, as also has been pointed out, when these statutes delegate wide discretionary powers to the executive, it still remains true that the broad policy which is to be pursued is that which is laid down in the statutes themselves.

Extent of  
legislative  
control

The Pres-  
ident and  
Public  
Opinion

Statute  
Law-Mak-  
ing

It is not unusual to think of legislative enactments as having for their main purpose the establishment of private laws, that is, the creating of private rights and duties, and fixing rules of conduct regarding the holding and use of private property, the entering into contracts, the defining of crimes and fixing the penalties for their commission, etc. In fact, however, comparatively little of the time and thought of legislative bodies is devoted to these matters. Especially in the United States and in Great Britain and her overseas possessions, the task of developing the private law of persons and property is left to the courts. And even in these countries where that law finds exclusive statement in statutory form, changes are so seldom required that not a great deal of legislative attention is demanded for making them.

Legisla-  
tures and  
admin-  
istration

This means that most of the time and thought of legislative bodies is devoted to matters of public administration and public policy—to establishing the agencies and methods by which public business is to be transacted, to making provision for obtaining and to appropriating the funds thus required.<sup>1</sup> And where substantive legislation, as distinguished from administrative provisions, is demanded, the laws for the most part are concerned with matters of general governmental regulation, rather than with changes in existing private law of property and contracts. In other words, they deal either with matters of governmental organization and operation or with general questions of state control and regulation.

As showing the extent to which the Congress is concerned with matters of a purely administrative character we may quote the following from the work of Professor P. S.

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<sup>1</sup>Professor W. F. Willoughby enumerates as follows the functions performed by a modern legislative body, such as the American Congress: (1) a constituent assembly or constitutional convention; (2) a canvassing board and electoral college; (3) an organ of public opinion; (4) a board of directors for the government corporation; (5) an organ of legislation; (6) an executive council, and (7) a high court of justice. *The Government of Modern States*, p. 291.

Reinsch on *American Legislatures and Legislative Methods*.<sup>1</sup>  
He says:

While Congress, in the exercise of such powers as that to regulate interstate commerce, may originate rules by which people in general are bound in their business relations, such action does not constitute a large part of its work, and its legislation is ordinarily regulative of governmental agencies, or, in other words, administrative. The most cursory examination of the legislative work in any session of Congress will reveal the extent to which its attention is taken up with matters of administrative policy. Consider, for example, the topics of legislation in a recent Congress—the Fifty-seventh—they fairly indicate the character which congressional action takes. The principal work of that Congress embraced the following subjects: the creation of the Department of Commerce and Labor, the Elkins Anti-Rebate Law, the provision of the permanent census bureau, the maintenance of Chinese exclusion, the beginnings of the Panama Canal, the establishment of civil government in the Philippines with the extension of the gold standard thereto, the creation of the general staff (for the Army), the establishment of a national militia system, irrigation grants for the arid lands of the West, the augmenting of immigration restrictions, the Anti-Oleomargarine Act, the new Bankruptcy Law, the repeal of the Spanish War taxes, the removal of the duty on anthracite, and the appropriation of over \$1,500,000,000. The chief work of Congress is the appropriation of money for the work of the various departments of government, the providing of ways and means to meet this expenditure, the creation of new administrative agencies, the maintenance of the national defence on land and sea, the control of the various wards of the Nation—the Indians and the peoples of the Territories and dependencies—the regulation of economic activities so far as they form a part of inter-state commerce, and the administration of what remains to the United States of natural wealth in forests and other public lands.

The Business of Congress

This most excellent description of the normal activities of the American Congress also gives a very fair idea of the topics to which all national legislatures devote most of their time and which furnish the substance of most of their enactments. It is true that the American Congress,

The American Commonwealths

<sup>1</sup>P. 33. For more recent analyses of the work of Congress, see the regular notes in the *American Political Science Review*, Vol. XIII, p. 25; Vol. XIV, pp. 74, 659, etc.



being the legislature of a federally organized State in which the control of nearly all the private law is reserved to the member states, has not the constitutional power or need to concern itself with matters of private rights or duties. But even in unitary States it is an exceptional statute which has for its purpose a modification of the existing private law.

Governmental  
regulation

When, from matters of a purely administrative character, we turn to questions of governmental regulation, we find, in all modern governments, that the laws are concerned with such questions as the establishment of conditions under which certain businesses or employments shall be carried on; the control of corporations; the regulation of monopolistic enterprises; etc., nearly all having for their purpose the fixing of what are conceived to be the best possible conditions under which the people shall live or work, and trade and industry be carried on. All these, it is seen, are questions of public policy—what services the government itself shall perform, what regulation of social and economic conditions it shall provide, what agencies and administrative methods it shall employ for carrying out the duties thus assumed—but they are questions which the increasing complexity of modern life is forcing more and more on the legislature.

Varying  
importance  
of different  
legisla-  
tures

So much for the general character of the work of the ordinary legislative body. We now reach the fundamental political question as to the parts actually played by the members of the legislature, individually or as a body, in determining what the policies of the government shall be; and here we find in governments a wide range of difference, and that these differences are often due rather to the constitutional practices, or to the operation of political party organization, than to the formal provisions of constitutional law. Certain distinct types, however, stand out, and these we can best describe by considering briefly the several governments which illustrate them. In so doing we shall be



concerned only with the executive and legislative branches, since under all modern constitutional systems, the judicial branch participates only to a very slight degree in the policy-forming function, and a subsequent chapter is devoted to the special problems connected with the organization and operation of courts of law. But first, attention should be directed to some further questions of the organization of the legislature and the manner of its election.

#### TOPICS FOR FURTHER INVESTIGATION

The Powers of the President and the Senate over Foreign Relations.—Corwin, *The President's Control of Foreign Relations* (and authorities referred to); Willoughby, *Constitutional Law of the United States*; Butler, *The Treaty-Making Power of the United States*; Moore, "Treaties and Executive Agreements," *Political Science Quarterly*, September, 1905; Bryce, *The American Commonwealth*; Wright, "The Control of Foreign Relations," *American Political Science Review*, February, 1921, and "Treaties and the Constitutional Separation of Powers in the United States," *American Journal of International Law*, January, 1918; Lodge, "The Treaty-Making Power," *Scribner's*, January, 1902.

Popular Control of Foreign Policy.—For references, see above, p. 228.

Presidential Diplomatic Agents.—Foster, *The Practice of Diplomacy*; Taft, *Our Chief Magistrate and His Powers*; Howden-Smith, *The Real Colonel House*; Wriston, "Presidential Special Agents in Diplomacy," *American Political Science Review*, Vol. X, p. 481 (August, 1916).

The Business of Legislative Bodies.—Reinsch, *American Legislatures and Legislative Methods*; Webb, *A Constitution for the Socialist Commonwealth of Great Britain*; Ogg, *The Governments of Europe*; Bryce, *Modern Democracies*.

## CHAPTER XIV

### THE ORGANIZATION OF THE LEGISLATURE

Unicameral  
or Bicam-  
eral  
System?

AMONG the important questions which must be answered by any written constitution is whether the Legislature shall consist of one or of two Houses. Upon the comparative merits of the two systems political scientists are not agreed. It is a fact that in nearly all modern constitutional States the two-chambered system prevails, and this might seem to indicate a general conviction as to the superior merit of this form of legislative organization.<sup>1</sup> It may, however, be pointed out that where the existence of two chambers has not been due to the accidental working out of historical conditions, or mere imitation of other governments, there have been special and peculiar reasons why the bicameral system has been adopted or retained. Where, as in the United States, a federal government exists, a second chamber has been necessary in order to provide a body in which the states, as such, might be equally represented.

Decline of  
Second  
Chambers

In England, where a representative legislature first developed, more or less by accident it became finally settled that Parliament should consist of two rather than of one or of three Houses. And it is a significant fact that the constant tendency in England has been to decrease the powers of the Upper Chamber, until in 1911, by the Parlia-

<sup>1</sup>There is a good bibliography on the bicameral theory in Garner, *Introduction to Political Science*, p. 427 ff. Two volumes published more recently (with particular reference to the controversy in 1911 over the House of Lords) are J. A. R. Marriott, *Second Chambers*, and H. W. V. Temperley, *Senates and Upper Chambers*. The chapter (LXIV) in Lord Bryce's *Modern Democracies* is excellent.

ment Act of that year, the House of Lords was deprived of a very considerable part of the legislative influence and power which up till then it had managed to retain.<sup>1</sup> In the government of the Dominion of Canada an Upper House exists, but it has little power, and an attempt upon its part to exert a decisive influence would be resented by the people.<sup>2</sup> In the Australian Commonwealth and in the Union of South Africa there are upper chambers, but with elaborate constitutional provisions for overcoming the refusal of these Chambers to assent to legislative measures approved by the lower branch of the legislature.

The establishment and maintenance of upper chambers by the monarchies of Europe has been dictated by the desire and the conceived political necessity of providing an organ of government through which the conservative and especially the titled classes of the community might exercise a restraining influence upon the democratic chambers which the rulers were unwillingly forced to create. These upper chambers are, then, in their origin and deliberate intent, and in their actual operation, anti-democratic devices. They are agencies to curb the powers which

Represent-  
tation of  
conserv-  
ative  
classes

<sup>1</sup>The possible results of the Parliament Act are discussed by Dicey, *The Law of the Constitution* (8th ed.), p. xviii ff. and Low, *The Governance of England*. The House of Lords, two recent writers declare, has failed "to act efficiently as a revising and suspensory Second Chamber. Its decisions are vitiated by its composition—it is the worst representative assembly ever created, in that it contains absolutely no members of the manual working class; none of the great classes of shop keepers, clerks, and teachers; none of the half of all the citizens who are of the female sex; and practically none of religious non-conformity, of art, science or literature. Accordingly it cannot be relied on to revise or suspend, and scarcely even to criticise, anything brought forward by a Conservative Cabinet, whilst obstructing and often defeating everything proposed by a Radical Cabinet." S. and B. Webb, *A Constitution for the Socialist Commonwealth of Great Britain*, p. 63. But see above, pp. 98, 103.

<sup>2</sup>"The senate, chiefly by its failure to realize the professed expectations of the Fathers of Confederation, by its failure to make a beneficent impression on politics in Canada, or at any time in its fifty years' existence to convince the people of Canada that it was of any possible public usefulness, is, from the standpoint of students of the working of parliamentary institutions, the most interesting second chamber in the English-speaking world. It is especially so, when it is kept in mind that it represents the fourth attempt since 1791 to establish a second chamber, modeled after the house of lords, in the portion of the British Empire that is now comprised in the Dominion of Canada." Porritt, *Evolution of the Dominion of Canada*, p. 303.

the people exercise through their elected representatives. That single-chambered legislatures are practicable, however, is shown by the experience of the countries where they exist.<sup>1</sup> It is nevertheless a fact that there are no States of the first importance which have this unitary form.

Size of  
Second  
Chambers

As regards the composition of upper chambers it is found that with the exception of the English House of Lords none of them is predominantly hereditary in character, the majority of their members being executive nominees, or elected, or sitting by reason of *ex officio* right. The English House also is exceptional among upper chambers by reason of its size—about seven hundred.<sup>2</sup> Next in size are the Prussian *Herrenhaus*, with three hundred and seventy members; the Spanish Senate with three hundred and sixty, and the French Senate with three hundred. The American Senate has ninety-six, but originally had only twenty-six. The Canadian Senate has ninety-six members, and the South African forty. The Swiss *Ständerat* has forty-four, and the *Bundesrath* of the German Empire had sixty-one.

Non-legis-  
lative func-  
tions

In most cases the upper chamber is vested with functions not legislative in character, and which are not shared by the lower chamber. Especially is this true of the German *Bundesrath* which possessed so many of the powers ordinarily belonging to a constitutional monarch that by some commentators it has been held not to be primarily a legislative chamber at all. In the United States the Senate participates in treaty-making and executive functions and is the tribunal for the trial of impeachments.

<sup>1</sup>Greece, Bulgaria, Montenegro, several of the German and Central American States, and the Cantons of Switzerland are unicameral. Of the Provinces of Canada only two have second chambers, nominated for life by the provincial ministries. See Temperley, *Senates and Upper Chambers*, pp. 9, 37. On American experience, see Moran, *Rise and Development of the Bicameral System in America* (Johns Hopkins Studies, Vol. XIII).

<sup>2</sup>Comparatively few, however, attend the regular sittings. Three form a quorum.



These non-legislative functions, possessed by upper chambers, are, however, all such that their exercise might be otherwise provided for, and the justification, if there is any, for the maintenance of the bicameral system must lie in its legislative efficiency.<sup>1</sup> That two chambers make the process of legislation more cumbersome, more expensive, and furnish abundant opportunity for friction and discord, is of course plain.<sup>2</sup> These are entries upon the debit side of the account. Upon the credit side several important items find a possible place. In all federally organized governments the upper chamber would seem to be justified, if not imperatively demanded, in order that the member states of the Union may have an organ in which their rights, as such, will receive especial recognition and protection. How important this was conceived to be when the American Constitution was adopted is shown by the care that was taken to provide that "no state, without its consent, shall be deprived of its equal suffrage in the Senate." Until 1913 it was furthermore provided that

Federal  
Systems

<sup>1</sup>In some cases there are arrangements permitting the Lower Chamber to override the objections of the Senate. Thus, the Constitution of the German Commonwealth provides (Art. 74) that "In case of objections [by the National Council] the law is returned to the National Assembly for reconsideration. If an agreement between the National Assembly and the National Council is not reached, the National President may within three months refer the subject of the dispute to the People. If the President makes no use of this right, the law does not go into effect. If the National Assembly disapproves by a two-thirds majority the objection of the National Council, the President shall promulgate the law in the form enacted by the National Assembly within three months or refer it to the People."

Similarly, the Constitution of Czechoslovakia provides that "A measure passed by the Chamber of Deputies shall become law in spite of the dissent of the Senate if the Chamber of Deputies by a vote of the majority of the entire membership reaffirms its original vote. If the Senate rejects by a three-fourths majority of the entire membership a bill which was passed by the Chamber of Deputies the bill becomes law only if repassed by the Chamber of Deputies by a majority of three fifths of the entire membership." (Art. 44.) These are interesting adaptations of the theory of the Parliament Act of 1911.

<sup>2</sup>Lord Bryce quotes the *dictum* of Siéyès, who is said to have asked: "Of what use would a second chamber be? If it agrees with the Representative House, it will be superfluous; if it disagrees mischievous," a dilemma which owes its "point to the omission of other possibilities. A Second Chamber may do work involving neither agreement nor disagreement with the Other House, and it may, where it agrees in aims, suggest other and better means of attaining them." *Modern Democracies*, Vol. II, p. 399.

the two Senators from each state should be chosen by the legislature thereof. The Seventeenth Amendment now provides, however, that they shall be "elected by the people thereof." Equal representation for the states, irrespective of their size or population, is retained. What effect this change in the mode of electing its members will have upon the Senate as representative of the states as such remains to be seen.

Revisory  
Powers

Leaving aside the special need for second chambers in federal governments and dependencies (to represent the mother country), their possible value is as organs to revise projects coming to them from the lower chambers. This revision may be of two kinds: either to moderate or prevent undue radical or hasty action upon the part of the popularly elected lower chambers, or to introduce technical improvements in terminology or substance to the measures sent up to them.

Check on  
hasty and  
radical ac-  
tion

It has already been pointed out that many of the upper chambers in Europe owe their existence primarily to the fact that, when the rulers were forced by popular pressure to create representative bodies, it was deemed desirable to check their powers by requiring that their proposals, before becoming effective, should obtain the approval of a body in which the monarchical, or at any rate the non-popular influence would be controlling. But even in those governments which have adopted the popular principle without reservation, the opinion has been very generally held that it would be a dangerous policy to permit public policies to be wholly determined by the vote of a single body of men who might be swayed by passion, ignorance, or self-interest. This view is well expressed by John Stuart Mill when he writes:

It is important that no set of persons should, in government affairs, be able even temporarily to make their *sic volo* prevail without asking anyone else for his consent. A majority in a single assembly, when it has assumed a permanent character—

when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overwhelming, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls makes it desirable there should be two chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.<sup>1</sup>

In Great Britain the House of Lords has lost all real power to prevent legislation upon which the House of Commons has firmly determined, but it still retains the power to delay action and to compel, except as to money bills, a second and a third consideration of proposed measures. This, in itself, has necessarily a moderating influence. The radical diminution in the legislative powers of the House of Lords, effected by the Parliament Act of 1911, was due to the fact that the Lords had not properly exercised their revisionary function. They had been continuously of one political mind—Conservative—and had placed no real check upon the measures of the Commons when the Conservatives or Unionists were in power, but had continuously opposed the proposals of the Liberals.

As is elsewhere pointed out, the responsible parliamentary or cabinet system of government works with complete satisfaction only when the responsibility of the executive is to a single chamber. Before 1911 it had become an established rule that the House of Lords should not refuse its assent to measures of the Ministry in power if the electorate had had an opportunity at a general election to express its approval of them or to continue in power the government responsible for their original introduction. And, in fact, the Ministry has always had a means of overcoming their resistance, if persisted in, by advising, that is, practically compelling, the King to appoint enough new Lords to obtain a majority in support of the measures

Dominance  
of Com-  
mons

Cabinet  
Govern-  
ment and  
Bicameral  
Theory

<sup>1</sup> *Representative Government*, Chap. XIII.



The French  
Senate

upon whose enactment the party in power is determined. In Canada, the Senate, composed of members appointed for life, has but seldom attempted to resist the will of the majority in the lower house. In France, however, we have the situation of cabinets responsible to both branches of the legislature. The Senate has possibly not the influence of the Chamber of Deputies, but it is difficult for any government to remain in power which is not able to obtain its support.<sup>1</sup> The Senate, it may be added, claims legal equality of power, but in practice it admits the so-called "doctrine of the last word" as to money bills, and, in some respects, defers to the more popularly elected Chamber on other legislation.

Dissolution  
of the  
Chamber

One special power possessed by the French Senate deserves a word of notice. This is that without its approval the President cannot dissolve the Chamber of Deputies. This provision contained in the Constitution can scarcely be deemed a wise one, for it is essential to the successful working of the cabinet system that it should be able to dominate the popular chamber, and this it cannot do unless it can threaten its members with a dissolution, necessitating their going again to their constituents for reëlection unless they agree to the measures proposed to them. And, furthermore, it is but reasonable that if a cabinet, though defeated in the parliament, believes that it has the support of the people it should have the opportunity to test the correctness of this belief. In France the necessity for obtaining the assent of the Senate to a dissolution of the Chamber of Deputies has, in fact, made dissolution practically impossible. Dissolution has taken place but once since the Third Republic was established, and then without satisfactory results. To this lack of power to order a dissolution, and to its responsibility to two chambers, has been largely due the lack of controlling influence

<sup>1</sup>For an account of the Senate's fight against the Bourgeois Cabinet in 1896, see Sait, *Government and Politics of France*, p. 82.



of the French Cabinet, and, because there has not been this dominating control the responsible parliamentary system has operated far less satisfactorily in France than it has in Great Britain.<sup>1</sup>

As mentioned above, an upper legislative chamber can serve a useful purpose not only as a means of moderating extreme or otherwise inexpedient action upon the part of the lower house, but by improving the measures sent to it in their technical phrasing or details. This it can do, however, only in case it includes among its members persons who are specially qualified for the task, either by reason of practical experience or special training. In this respect the British House of Lords has much to commend it. It contains many among its members who have no special qualifications as legislators, but these seldom attend its sessions, or, when they do, rarely participate actively in its work. Many of those who do the bulk of the work have been made members of the House because of high official positions previously held by them, or because of distinction they have won in the field of science or of unofficial public service. In America, also, the tendency has been for the Senate to contain a larger proportion of older publicly trained men than is found in the House of Representatives. And, of course, the fact that Senators are elected for six years, instead of two years as is the case with Representatives, operates to raise the level of their practical experience above that of the lower chamber.

Whether at the present time there is sufficient justification for the maintenance of the bicameral system in the states of the American Union would seem to be very doubtful. The fact is that the upper chambers of the state legislatures do not conspicuously excel the lower chambers either in intelligence, sobriety of judgment, or disinterestedness. No evidence exists that, in truth, the measures that originate in these upper chambers are wiser

Compet-  
ence of  
members of  
Upper  
Houses

The Bica-  
meral  
System in  
American  
Common-  
wealths

<sup>1</sup>*Op. cit.*, pp. 60, 68 ff.

than those that take their rise in the lower chambers, or that those measures which have come from the lower houses emerge in an improved condition from the upper chambers. And, in addition, is the fact that when it is known that a decision is not final, but is subject to revision and approval by another body, it necessarily has the tendency to make the originating body less careful than it otherwise would be of the substance and form of the measures to which it gives its approval. At the best there is a division of responsibility which is always unfortunate.

In earlier years bicameral legislative bodies existed in the governments of most of the American cities. For years now, however, the tendency has been to change to the simpler one-chamber system.<sup>1</sup>

Closely akin to the bicameral problem is that of the representation of interests, rather than geographical sections of the community.<sup>2</sup> Proposals for a modification

<sup>1</sup> Munro, *The Government of American Cities* (rev. ed., 1920).

<sup>2</sup> See Garner, *Introduction to Political Science*, p. 469 ff. For the Prussian three-class system, see Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 304; "Reform in Prussia," *The Round Table*, June, 1917. The five-class system in Austria (abolished in 1907) is described by Lowell, *op. cit.*, Vol. II, p. 87.

"An Attempt was made in some of the ancient republics to give proportionately greater weight in voting, not indeed to virtue and wisdom, but to property and (implicitly) to education, by dividing the citizens into classes or sections, and allotting to each a single collective vote, determined by the majority within the section. The richer sort were placed in several of such sections and the poorer in others, each of these latter containing a larger number of voters than the sections of the richer citizens. Thus the votes of the richer sections balanced those of the poorer, *i. e.* the voting power of numbers was balanced by the power of voting wealth. Similarly, by the constitution of Belgium persons possessing certain property or educational qualifications were formerly given three or two votes each, the ordinary citizen having one. This Belgian plan has now been abolished; and is not likely to be tried elsewhere. It was proposed in England many years ago, but then rejected on the ground, *inter alia*, that the rich had various means of exerting influence which other classes did not possess. Whatever objections may be taken to a method which gives an equal voice to the wisest and most public-spirited citizen and to the ignorant criminal just released from gaol, no one has yet suggested any criterion by which the quality of voters should be tested and more weight allowed to the votes of the fittest. Equal Suffrage as well as Universal Suffrage has apparently to be accepted for better or worse." Lord Bryce, *Modern Democracies*, Vol. I, p. 152.

of the territorial basis of legislatures have received greater consideration recently on account of the arguments of French political theorists,<sup>1</sup> the Guild Socialists<sup>2</sup> in England, and the Russian experiment with the soviets.<sup>3</sup> But the theory is old and has been supported by many respectable writers. Thus, Lord Brougham declared that the British electoral system sinned grievously since it recognized "but one test, the ancient distribution of men into towns,"<sup>4</sup> and similar considerations have been advanced by American writers, long before the outbreak of the war:

The significant change that has occurred is that territorial propinquity is no longer coincident with community of interest. This change is wholly crucial. It means that where political life could be successfully organized in terms of land occupation, such organization is now in large measure artificial and ineffective. Community of interest is now determined fundamentally by specific vocation. A physician living in the eleventh precinct has far more community of interest with a physician living in the fifth precinct than he has with the broker who lives around the corner. Indeed, if one were to trace the lines of interest-demarcation in a great city, one would find them here, there, and everywhere, crossing and recrossing all the conventional political boundaries. If one seeks, in short, the natural groupings in our modern world, one finds them in the association of teachers, of merchants, of manufacturers, of physicians, of artisans. The Trade Union, the Chamber of Commerce, the Medical Association, the Bar Association, the Housewives' League—these even in their half-formed state are the forerunners of the true political units of the modern State.<sup>5</sup>

On the other hand it is clear that selfish interests rather than the ideal of the commonweal would influence the

Geographi-  
cal and  
class re-  
presenta-  
tion

Territorial  
community  
of interest  
unreal

<sup>1</sup>Duguit, *Droit constitutionnel*; Benoist, *Crise de l'État moderne*, etc.

<sup>2</sup>Cole, *Guild Socialism Restated* (1921); Reckitt and Bechhofer, *The Meaning of National Guilds* (with bibliographies).

<sup>3</sup>The best book dealing with the political theory of the Russian Revolution is R. W. Postgate, *The Bolshevik Theory*.

<sup>4</sup>*The British Constitution* (Works, Vol. XI), p. 95.

<sup>5</sup>H. A. Overstreet, "The Government of To-morrow," *The Forum*, July, 1915. See also, J. R. Commons, *Proportional Representation*.



Dangers of  
class  
antagonism

decisions of such professional representatives; territorial sectionalism—from which the United States has suffered so much—would be duplicated in a worse form; class antagonism would be encouraged, and civil war between groups rather than between sections would be possible.<sup>1</sup>

Value of  
discussion

But in two respects the discussion is fruitful. Legislative business is becoming so bulky and complex that representatives of no particular competency are unable to deal with it and rely more largely on extra-governmental organizations for advice. Coal commissions, industrial conferences, finance committees, etc., advise the legislature. But more important—and more ominous—is the fact that every interest, if not represented by properly accredited legislative members, is looked after by a lobby. In a sense, if the federal features of the American Senate were abandoned and the attempt were made to represent interests, the change would be little more than a legalization of the one hundred or so lobbies in Washington.<sup>2</sup> On the issues raised by this rather fanciful suggestion the reader can form his own judgment. They go to the basis of the processes of American politics.

Another important question is the manner in which

<sup>1</sup>There is a somewhat confused but strong argument against occupational representation in Ramsay MacDonald, *Parliament and Revolution*. "The problems and concerns of a national legislature," he says, "must not only be wider than those of the great majority of individuals who compose the community, whether they be doctors or roadmakers, professors or fishwives, but when it fully appreciates the problems and concerns of its constituencies, being national and international in its outlook and responsibility, it must see those things not in relation to the people in whose experiences they originate, but to the whole community in which they are contained." (p. 49).

It is interesting to note that Mr. and Mrs. Webb in their proposals for the modification of the English government, urge that the Social Parliament (in a bicameral system, the Political Parliament being the other chamber) should be elected geographically. *A Constitution for the Socialist Constitution of Great Britain*, p. 120. Esmein opposes the representation of interests on the ground that national sovereignty would be impaired. He would permit the presentation of the interests of groups by unofficial assemblies. *Droit constitutionnel*, 3d ed., p. 202.

<sup>2</sup>A list of the lobbies now operating in Washington is given below, in the Appendix.



legislatures should organize to do their work. Congressional government is committee government, but the use of committees is not peculiar to the American House of Representatives, for all legislative bodies the world over have found it advisable to establish smaller groups of their members for the purpose of obtaining information, and relieving the Houses as a whole from some of the preliminaries of legislation. That which gives peculiar character and importance to the committees of Congress, however, is the fact that in their hands are vested not only powers of investigation, but of framing the measures that are to be brought up for consideration and enactment, and of determining whether a measure shall be reported at all. The result is that these committees exercise a decisive control over legislation.<sup>1</sup> Their influence is, so to speak, "projected" on the floor of the House of Representatives and into the Conference Committees, which adjust differences of opinion between the House and the Senate.

Legislative  
organiza-  
tion

This system of committees is one of the most distinctive features of the American Government. They are not organized in order to articulate with the executive, but simply to divide the labor of preparing legislation. Too often, indeed, their number is increased in order to provide places for members of the House and the Senate, and committees are kept in existence for years, without ever holding meetings, simply to provide the perquisites of clerkships, rooms, etc. for their chairmen.

Congres-  
sional Com-  
mittees

The committees meet in secret, and, in this respect, they resemble the British Cabinet. Very frequently, though, they hold elaborate hearings, reports of which are printed for limited distribution. At these hearings all the interests which are affected by proposed legislation are represented, and the issue is really fought out before the committee, rather than on the floor of the House. There

<sup>1</sup> Wilson, *Congressional Government*; McConachie, *Congressional Committees*.

Their distinctive features

is nothing to resemble this practice in the procedure of foreign legislative bodies, and it deserves more attention than it has yet received from American writers. Congressional committees, it may be added, give representation to the minority; but the majority members frequently hold caucuses on important bills of political significance, excluding the minority members until the measures are framed, and when, as was the case in the Sixty-seventh Congress, one party has a huge majority, the places allowed the minority party are reduced, so that members of the majority may have attractive berths on important committees. With members of Congress possessing unlimited authority to introduce bills and with every proposed measure referred to the appropriate committee, the system in a sense, serves the same end of popular participation in law-making which is sought by the initiative.

In the British House of Commons provision is made for several classes of committees, but until recently none of them has been endowed with the policy-forming influence enjoyed by the committees of Congress.

Committees in House of Commons

In the first place there are a number of Select Committees, some of them, as, for example, those on Accounts and Public Petitions, appointed each session, lasting throughout the session, and known as "Sessional Committees." Other select committees are appointed from time to time, as occasion arises, in order to obtain information needed by the House, and go out of existence when they have reported. President Lowell, with regard to the purposes of these committees, says:

Even when a particular bill is referred to it [Select Committee] the primary object is not to take the place of debate in the House, and in fact by the present practice a select committee saves no step in procedure, a bill when reported by it going to the Committee of the Whole House, for discussion in detail, precisely as if no select committee had been appointed. Select committees are the organs, and the only organs of the House for collecting evidence and examining witnesses, and hence they are

commonly given power to send for persons, papers, and records. They summon before them people whose testimony they wish to obtain; but although a man of prominence, or a recognized authority on the subject, would, no doubt, be summoned at his own request, there is nothing in their procedure in the least corresponding to the public hearings customary throughout the United States, where anybody is allowed to attend and express his will.<sup>1</sup>

In addition to Select Committees, the rules of the House of Commons have also made provision for Standing or Grand Committees. These are large bodies of from sixty to eighty members, and exist throughout the session. Until 1919, they were four in number, and to them were referred bills—but never money bills—for preliminary discussion. In this respect they were like the committees of Congress. But they differed from them in that they dealt only with measures of a more or less technical character with regard to which political partizanship was not expected to enter, and they had no power to initiate or formulate legislative proposals. Their sole purpose was to save the time of the House as a whole, by enabling a portion of the members to discuss legislative details and thus get the measures referred to them in shape for final action by the House as a whole. They in fact were, as President Lowell says, miniatures of the House, the different parties being represented on them in the same proportion that they were represented in the House itself, and their proceedings being a substitute for what is known in the House as “Committee of the Whole.”

Nevertheless, it was true that practically every bill had to go through its committee stage in the House of Commons itself. This meant a very marked congestion of business. The King, in his speech from the Throne on the opening of the present parliament (February 11, 1919) spoke of the “large number of measures affecting the well-being of the nation” that awaited consideration by the

**Their  
functions**

**Changes in  
procedure,  
1919**

<sup>1</sup> *The Government of England*, Vol. I, p. 267.



Commons. It was of the utmost importance he said, "that their provisions should be examined, and if possible, agreed upon and carried into effect with all possible expedition. With this object in view my Government will invite the consideration of the House of Commons to entertain proposals for the simplification of the procedure of that House which, it is hoped, will enable delays to be avoided and give its members an increasing opportunity of taking an effective part in the work of legislation."<sup>1</sup>

The proposals of the government were accepted by the House with unfeigned reluctance. They include the increase of the standing committees from four to six. All bills are committed to one of these committees unless the House otherwise orders, with the exception, however, of (a) bills imposing taxes or making appropriations and (b) bills confirming provisional orders. The House may, on a motion by the member having a bill in charge, commit it to a Standing Committee in respect to some provisions or to the Committee of the Whole House with respect to other provisions.<sup>2</sup> In practice, however, bills of first-rate importance or highly controversial are kept from the committees, but mention may be made of the fact that the Electricity Supply Bill of the Session of 1919 and the Coal Mines Decontrol Bill of the Session of 1921 were sent to committees. The committees consist of from 60 to 80 members; closure can be applied by a vote of 20 in favor, and a quorum is the same number. Meetings can be held

<sup>1</sup>In addition to the change in the committee system, the Government proposed "kangaroo," a form of closure under which the Speaker has the power to select the amendments which the House may discuss. Until March 31, 1919, furthermore, no bills except government measures were to be introduced and the speaking privileges of private members were curtailed. The Government also wanted to cut down the discussion of supply—the historic *raison d'être* of the House—from twenty to twelve days, but on this point was forced to give way. The debates on these procedural changes are very interesting, and show how uneasy the House is over the decline of parliamentary authority, the dictatorship of the Cabinet, and the submergence of the private member. See *Parliamentary Debates*, Fifth Series, Vol. CXII (February and March, 1919.)

<sup>2</sup>*The Constitutional Year Book for 1920*, pp. 157, 462.

To avoid  
delays

Authority of  
new com-  
mittees



at the same time that the House sits and thus the Commons can carry forward the work of dealing with four or five measures at the same time.

**Meet while  
House  
meets**

The plan has not been in operation long enough to warrant any conclusions as to its results. There have been from time to time reports that little interest is shown by the committees and at least one measure—the Plumage Bill—failed because the committee could not secure a quorum. Two different opinions by English writers may be quoted.

“There is little, if any, report of their [Committees] proceedings in the public press,” says one authority, “and eloquence and irrelevant oratory are largely discountenanced. As a result the proceedings are business-like, and, in the case of all bills, except those arousing angry opposition to their passage, the work of construction is probably done far better than under the old method of full discussion of the whole House.”<sup>1</sup>

**Different  
views of  
expedient**

On the other hand, we may quote a more pessimistic view:

Closure has now been made a normal feature of debate, and it is accompanied by a re-organization of the committee system, fatal both to the dignity and utility of the House. The number of the standing committees was increased from four to six; but, whereas, in the previous period, the standing committee only sat when the House was up, its proceedings are, for the sake of dispatch, concurrent with the sittings of the House itself. The result is to make the process of debate a worthless farce. Not only do the committees sit too long, with a consequent fatigue that only an iron constitution can withstand, but the frank admission is cynically made that a member who may know nothing of the subject in debate may rush from his committee to record his vote. Debate upon such terms is self-destructive, and the House of Commons is now a chamber filled only when some chance visit of the Prime Minister, or the excitement of a vote of censure may compensate for the boredom unreality always involves.<sup>2</sup>

<sup>1</sup>Masterman, *How England Is Governed*, p. 228.

<sup>2</sup>Laski, “Mr. George and the Constitution,” *The Nation* (London), November 6, 1920.

Continental parliaments also make use of committees as a convenient means of obtaining information, and for securing preliminary discussion of measures before they come up for final enactment. In some cases these committees exert a powerful influence upon legislation. Especially is this true of the Budget Committees to which are referred revenue and appropriation measures.

France's  
exper-  
iments

France's experience with committees of the legislature has been very interesting. Until 1902 they were temporary and special<sup>1</sup> and indeed those of the Senate, with a few exceptions, still are. In 1902, however, the rules of the Chamber were changed so that the Commissions are permanent;<sup>2</sup> in 1910, the method of election was changed;<sup>3</sup> and in 1920, their number was increased to twenty-one. In their composition, they represent rather faithfully the political groups in the Chamber, prepare legislative proposals so that the proceedings in the Chamber are frequently perfunctory, and, organized to articulate with the executive departments, they are able to exert a control over administration which is unknown to the House of Commons or the American Congress. It is this latter feature of their activities which makes them so interesting and there has been, at times, a great deal of sentiment in the House of Commons in favor of their inauguration there.<sup>4</sup> Concerning their actual working a

Temporary  
Committees

<sup>1</sup> Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 111.

<sup>2</sup> Sait, *Government and Politics of France*, p. 204.

<sup>3</sup> Duguit, *Manuel de droit constitutionnel* (3rd ed.), p. 433.

<sup>4</sup> In his statement taking over the government in December, 1916, Mr. Lloyd George confessed that he did not think the existing methods of parliamentary control efficient; they tended to give undue prominence to trivialities and to minimize and ignore realities. It was doubtful whether the situation could be improved, but Mr. Lloyd George declared:

"I have always thought . . . that the French system was a more effective one—the system whereby Ministers have to appear before Parliamentary Committees, where questions can be asked them, and where they can give an answer which they would not care to give in public. I think that in many respects that system has helped to save France from one or two very serious blunders." *Parliamentary Debates*, Fifth Series, Vol. LXXXVIII, p. 1344. Mr. Lloyd George refused to commit the Government further than to promise an investigation. "It is just possible," he said, "we might refer the matter to

former member of the Chamber of Deputies<sup>1</sup> may be quoted:

"In all the countries of the Entente the war has aroused interest in the system of parliamentary commissions which prevails in the French Chamber and Senate. Broadly speaking, it may be said that this type of parliamentary organ is regarded with distrust by parliamentarians who happen to be ministers, and with favor by those who are not in office. The ordinary deputy regards his parliamentary commission as a place where he may legitimately seek information on the conduct of the war and on other vital matters at a time when such knowledge interests the general public far more than in time of peace, and yet it is necessarily the privileged possession of a few. Practically all governments, on the other hand, are apt to regard this institution as an infernal machine with which to torture ministers. These are the reactions natural to the respec-

Parliamentary Commissions

Parliament to settle for itself, because it is not so much a question for the Government as a question for Parliament itself to decide, subject, of course, to any criticism or suggestion which the Government might wish to make, as to the best and most efficient methods during a period of war of exercising Parliamentary control over the Departments."

Reluctance of the Government, however, to relinquish its secretive dictatorship prevented any attempt to introduce the principle. Mr. Lloyd George's enthusiasm waned, also, when Premier Briand told him that the Commissions were frequently annoying, as time consumers and as embarrassing interrogators. Monsieur Briand, however, was a remarkable witness to bring against the system since his political success was made on a Report of the Commission on the Bill for the Separation of the Church and State.

The whole debate in the Commons—and the matter was returned to a number of times, particularly in the discussion of the procedure proposals in February, 1919—is of great interest. See *Parliamentary Debates*, Fifth Series, Vols. LXXXVIII, XCII, XCV, and CXII.

<sup>1</sup>Étienne Fournol, "The System of Parliamentary Commissions in France," *The New Europe*, August 1, 1918. There is very little material on the manner in which the French Parliamentary Commissions actually work. The descriptions by Lowell and Bodley are both sadly out of date. Sait and Duguit are clear but brief. Pierre (*Traité*, Sec. 711 and *Supplément*, Sec. 711) is fuller. An unfavorable view is taken by the anonymous author of *Lettres sur la réforme du gouvernement* (Paris, 1918); of interest also are Barthélemy, *Démocratie et la Politique étrangère*; Buell, *Contemporary French Politics*, and a recent French doctoral dissertation, Bigaud, *Les Commissions Parlementaires en France, en Angleterre, et aux États-Unis* (Toulouse, 1920). There is also a British Parliamentary Paper on the French Commissions and committee organization in other systems, *Accounts and Papers: Miscellaneous, 1912-13*, Vol. LXVIII (Cd. 6323).



tive positions of those concerned; but, on subjecting the system to analysis, we shall find that the elements of the subject are not quite so simple nor the interests of those concerned quite so mutually hostile as would appear from statements which are often made.

**Separation;  
of Powers**

“The parliamentary commission is really an institution which provides common ground for the legislative and executive powers, and offers them the opportunity of mutually influencing one another, and we may say that, in proportion as the public administration of any country is the subject of distrust or confidence, the system of parliamentary commissions will be regarded with favor or hostility. The history of the transformation which the commissions of the French Parliament have undergone is interesting in this respect; for, while the Chamber of Deputies in particular has always employed the commission system for its work, it was first restricted entirely to the preparatory stages of legislation. It was only in 1902 that the commissions were established in their present form in which they have become a recognized and efficient instrument of control over the executive government. Formerly the Chamber of Deputies appointed a special commission for each bill presented to it; one bill, one commission. The commission came into being with the presentation of the measure and expired on its passage into law. The commissions themselves were nominated by the *bureaux* of the Chamber and by a mixed system of election and balloting, in which luck and deliberate choice played an equal part, a certain number of deputies, usually from twenty to thirty, were especially charged with the committee work of each bill. The special division of the whole Chamber into *bureaux*, and the subsequent nomination of the commissions, is a feature peculiar to French parliamentary practice and has a definite historical origin. It was, indeed, the practice in France before the Revolution, when there was no parliament, properly speaking. The French

**Nomination  
by Bureaux**



Monarchy possessed, indeed, deliberative assemblies of whose fate it is curious to note that they practically lost their status in France about the time when similar institutions took firm root in England. The States-General, as they were called, worked on the system of the division of labor by means of *bureaux*, a circumstance which we may regard as something of a miracle, and to which I draw the especial attention of my British friends who are more prone than my French compatriots to find reason for veneration in the antiquity of an institution.

“Modern parliamentary practice had thus adapted an old custom to the legislative work of parliament when, in 1902, the whole system underwent radical reform which substantially changed the character of the commissions appointed by the Chamber of Deputies. Let me remind my British readers that the French Chamber is elected for a fixed period of four years, and during the whole period of the Third Republic the Chamber has never [*sic*] been dissolved.<sup>1</sup> It was natural, therefore, that, in 1902, the Chamber should conclude that the work of Parliament would be both expedited and improved if these commissions were given a more permanent mandate by being set up for life of each Parliament. The Chamber further decided that the lines of demarcation between the different commissions should follow those of public administration, and, therefore, it set up sixteen permanent commissions concerned with the Army, the Navy, Foreign Affairs, Commerce, and all other branches of the public service in France. A study of the debates which took place at the time proves that, in adopting these reforms, the Chamber was thinking mainly of an improvement in its legislative machinery, and not specifically of the relation between the executive and legislative powers. It seemed reasonable that bills dealing with military, naval, commercial,

Commissions now permanent

Articulate with Departments

<sup>1</sup>[See Lowell *Governments and Parties in Continental Europe*, Vol. I, p. 79; Sait, *Government and Politics of France*, pp. 70, 171, 275.]

fiscal, and other affairs should be submitted respectively to the same groups that had dealt with legislation of the same character in the immediate past. But, in practice, the logic of facts is often more capricious and, at the same time, more effective than the logic of ideas—and you in England know this so well that you have not hesitated to make it one of the fundamental principles of British politics. In the present case the logic of facts produced certain results in the system of permanent commissions which were by no means fully foreseen by those who framed the original plan.

Legislative  
work of  
Commis-  
sions

“In France the legislative operation known to the House of Commons as the committee stage takes place in the commission, the other stages in full session of the Chamber. This practice gives each of the commissions an effective, some would say a decisive, influence in the work of the French Parliament. But the activity of the commission is not restricted to legislation, for parliamentary control over the executive is almost exclusively exercised by these commissions. Though the specific act of controlling the ministry by a vote of confidence or a vote of censure takes place in the Chamber itself, the whole circumstances which lead up to such a critical debate in the Chamber are prepared and reviewed in the commission. Thus the plan of dividing the Chamber, so to speak, into as many compartments, and of entrusting the supervision and control of the great public departments to each one of these, means, in practice, that at any given moment the Chamber of Deputies contains a group of men who are in some sense specialists within their own commission. And it seems not improbable that, where the system can be made to work well, it offers the best method of controlling the executive. Who can doubt that, in these circumstances parliamentary control is at once better informed, perhaps more meticulous, and certainly more redoubtable than the roving criticism which would prevail in any open ses-

Their  
members  
become  
specialists

sion of Parliament itself? An efficient commission, for instance, is the implacable enemy of red tape, and the effect of the system on the parliamentary career of the deputy is that, without prejudice to the general mandate which belongs to him as a national representative, he becomes, as it were, earmarked to the supervision of one public department. And the president of each of these commissions is either a powerful ally or a most redoubtable critic of the corresponding minister.

"The war has given the system of commissions a new utility which was not foreseen by the reformers of 1902. The French Parliament of that year foresaw no war. . . . It is therefore unnecessary to remind my readers to-day that the changes wrought in the French parliamentary system in 1902 were not designed to meet war conditions, though, in certain respects, the intentions of their framers were to heighten the efficiency of the executive power. The war itself has certainly given these parliamentary commissions a new and high importance, which reached its climax in a struggle which will be justly famous in the history of French administration: the long struggle between the Army Commission of the Senate and the War Office. It will be remembered that the French Parliament adjourned on 4 August, 1914, and met again on 22 December. The Army Commission of the Senate, under the chairmanship of Monsieur de Freycinet, a statesman of authority and experience who had formerly been Minister of War, immediately came into collision with the War Office, not on the conduct of war, which concerned neither of them, but on the question of supplies. The controversy raged for a considerable period, and ended, as most people now believe, with the decisive victory of the commission. A struggle of this kind shows how these commissions can be of the highest national service. It was the first close encounter between the commissions and the bureaucracy during the war, and though it was the great-

**Brakes on  
the  
Adminis-  
tration**

**Influence  
of the War**

**Conflicts  
with  
Executive**



est of conflicts which have occurred during the past four years it stood by no means alone, although certain others which are still in progress are not yet ripe for an impartial judgment. It has often been said that parliamentary institutions are not well adapted to a state of war. The parliamentary commissions of the French Chamber have proved conclusively that the bureaucracy itself requires drastic handling before it can be an efficient war instrument, and that an independent critical body like the commission is the most effective lever which public opinion can use to bring about necessary changes. Red tape, the worship of precedent and uniformity, as well as love of inertia, prevailed in every government office. The eradication of these vices can only be successfully carried out by action from without, and this external action usually takes one of two forms: either the personal energy of the minister or the pressure of parliamentary criticism. But since, in the parliamentary *régime*, ministers are chosen outside the ranks of the service which they control—the right practice in my belief—they often lack information and first-hand knowledge both of the problems with which they have to deal and of the machine which they are called to control. They are therefore apt to lack both freedom of decision and initiative, and in this respect the part which our parliamentary commissions play is that of keeping ministers up to the mark. During the past four years we have watched the spectacle of these commissions inviting, or even driving ministers to put their administrative house in order for the purpose of carrying on the war. On the other hand, ministers often find the commissions a most valuable link with parliamentary opinion, especially when the Chamber itself is in vacation. And though it is true that the commissions themselves sometimes act hastily and indiscreetly, the attitude of each minister towards them is usually a pretty good index of the efficiency of his own administration. The best proof of this is that you

Control of  
Bureau-  
cracy

Initiative of  
Commis-  
sions



will hear ministers in the same government both applauding and condemning the system. The whole subject is a fertile source of reflection: but I must set temptation aside and will close this brief argument with reference to one matter with touches Foreign Affairs. It is commonly said that the people of Europe, henceforth warned against the evils of secret diplomacy, will never again relinquish the control of foreign affairs in peace or in war entirely to their governments. This would appear to mean that the national will is to be extended to cover a wider area, and that foreign affairs must undergo the control and revision of democratic parliaments. In a word, these parliaments will have to be consulted before the ratification of treaties. And if this ratification cannot take place by means of public debate it will either have to be done by secret session or by the action of a parliamentary commission. And, indeed, if the Government desire to consult Parliament on such a matter, it would almost certainly, as a first step, take the older and more experienced members of the Chamber into its confidence. It is true that the Chamber would, in all probability, entrust the task to its most distinguished men, who, however, would not necessarily be those most closely in touch with the public or most alive to the needs of the coming generation. A meeting of the elder statesmen, so to speak, is not a fit body with which to rejuvenate the world. It therefore would seem that, at such a moment, a commission truly representative of all parties in the Chamber could render the highest service to the nation."<sup>1</sup>

The efficient functioning of a legislative chamber and the general character of the government obtained under a

Conduct of  
Foreign  
Affairs

Advantages  
of a Comis-  
sion

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<sup>1</sup>Writing to the *London Times* (October 28, 1915), the late Lord Murray of Elibank, who had just returned from a visit to France, was enthusiastic about the advantages of the French system:

"These Commissions," he said, "work in conjunction with every Department of the State. During the last three months a new departure has been made by the establishment of an 'Inter-Commission' representing more particularly the

Rules of  
Legislative  
Procedure

given constitutional framework are largely dependent upon the nature of the rules adopted by the legislative chamber for the regulating of its own procedure.<sup>1</sup>

It is practically universal under all systems of constitutional government to permit the legislative bodies to adopt their own rules of procedure, subject only to certain special constitutional provisions. These special constitutional provisions usually relate to the number of members, proportioned to the entire membership, which shall constitute a legal quorum for the transaction of business, and the number of votes, proportioned to those present, which shall be required for affirmative decisions. For special purposes—impeachments, ratifications of treaties, constitutional amendments, expulsions, and the like—it is usual to require specially large votes, or quorums, or both. In some cases, also, certain formalities are required for the enactment of laws, such as three “readings” of a proposed measure, certification by the presiding officer that the measure has been thus duly considered and approved by the constitutionally required vote; that meetings shall be public (except under certain conditions or for certain purposes); that a *Journal* or minutes or full records of the proceedings shall be kept and published, and, quite generally, provision is made for the *ex officio* presiding officer of the Upper House. Universally the lower or more “popular” branch of the legis-

Constitu-  
tional con-  
trol is gen-  
eral

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Commissions of Foreign Affairs, War, and Marine. This Commission sits in secret séance on an average of three times a week; it consists of 36 members of the Lower House, with a chairman and secretary. As it is the custom for Ministers to appear before the Commissions from which the Inter-Commission has sprung, so it has become the practice for this newly constituted body to invite to its deliberations the parliamentary heads of departments and others whose opinions might be considered of value. I give an example: The Ministers for War and Marine appeared before the Inter-Commission to discuss the Dardanelles Expedition. Further, all questions affecting the war, whether from the point of view of the supply of men, armaments, or munitions—in fact, everything affecting the policy and progress of the war are subjects of well-informed discussions before this Commission. It is this plan of the Inter-Commission that I would respectfully urge upon the consideration of his Majesty's Government.”

<sup>1</sup>Cf. Redlich, *Parliamentary Procedure in England*, and Alexander, *History and Procedure of the House of Representatives*.

lature is permitted to choose its own "speaker" or president;<sup>1</sup> and both houses are permitted to appoint or elect their other officers and provide for their compensation.

The qualifications which must be possessed by persons in order that they may be eligible to election to the legislature are usually, but not always, fixed in the Constitution, but the houses are in almost all, if not in all cases, authorized to determine, each for itself, whether a person claiming membership has in fact these qualifications or has been duly elected. Furthermore, the houses are usually authorized to expel from membership persons deemed guilty of misconduct of a gravity which seems to merit this punishment. Ordinarily a specially large vote is required for this drastic action.

It is also usual for written constitutions to provide that, in general, each House of the Legislature may establish and enforce rules for the maintenance of its own order and decorum, and to provide rules in accordance with which its proceedings shall be conducted.

Qualifica-  
tions of  
Members

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<sup>1</sup>A. I. Dasent, *The Speakers of the House of Commons from the Earliest Times to the Present Day*; MacDonagh, *The Speaker of the House* [of Commons], and Follett, *The Speaker of the House of Representatives*. Upon the occasion of Mr. Lowther's retirement as Speaker of the House of Commons [1921] there was some objection to the action of the Government in selecting a candidate for the office [Mr. Whitley, Chairman of Committees] "with even less than the usual formality of consultation with the body of members, and especially of members who support the Government. . . . There would be evident evils in the growth of a tradition that election as Chairman of Committees should carry with it a prescriptive right of succession to the Speakership, and if Mr. Whitley is elected, it should be made very plain that the grounds for his choice by the House of Commons are his intrinsic qualifications rather than his having been Chairman of Committees. The House of Commons, too, might well assert its undoubted right to select its own Speaker, even though it should assent to the Government's nomination of Mr. Whitley. The way in which he has been flung at the head of the House of Commons is a glaring example of ignorant contempt for Parliamentary traditions. But even worse was the announcement that the King had 'approved' of the 'appointment' of Mr. James Hope to be Chairman of Committees. Mr. Whitley is still Chairman of Committees. Should he be elected Speaker, it will be for the House to choose his successor. That is the right of the House of Commons. The King, with all respect, has no title to 'approve' of such an 'appointment,' at least before the choice of the House is made known to him; nor, so far as we are aware, has he even then any right either of approval or of veto. The Government, when they made the announcement, thus attributed to the King the assumption of a right which he would be the last to claim for himself." *The London Times* (weekly ed.), April 15, 1921.



As typical of the provisions which have been mentioned, the following clauses from the United States Constitution may be quoted:

**The American Constitution**

The House of Representatives shall choose their Speaker and other officers.

The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

Each House shall be judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two thirds, expel a member.

Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

**Committee of the Whole House**

With reference to the constitutional requirements thus imposed, attention may be directed to a legislative device whereby certain of them are in part avoided. This device is known as the "Committee of the Whole House," and is one that possesses merits which make it worth consideration by other legislative bodies.

This is a committee provided for by the rules of the House of Representatives, and, as its name indicates, is composed of the entire membership of the House. But when "sitting" in this Committee the House is not technically in session, and it has its own chairman who is not the Speaker of the House, and it is provided that a quorum



of one hundred members is sufficient for it to do business, although this is scarcely one quarter of the entire membership of the House. Also it follows that not being technically the House itself, the constitutional requirement as to the recording of yeas and nays does not apply.

Because the Committee of the Whole is not the House itself (although identical with it as to membership and place of meeting) it is not competent to take final legislative action upon any matter, but must refer all its decisions back to the House proper for its formal approval or disapproval. There is this further advantage of the device of the Committee of the Whole that provisions can be made that certain rules of debate and of procedure which apply when the House itself is sitting, need not apply when it is "in committee."

Its advantages

Besides these general questions of organization for the transaction of business, every legislative chamber must adopt for itself rules governing debate and determining the order of, and the preferences to be given to, the various kinds of business which it must transact.<sup>1</sup> In its rules and practice, a legislature must see to it that the rights of those in the minority are respected. But those of the majority are also to be preserved. The greater the size of the House and the larger the number of matters that must be passed upon, the more imperative becomes the necessity of placing in the hands of the majority a right to refuse to entertain motions which are clearly improper or proposed only to delay or obstruct action, and thus to bring to final issue the questions that demand a settlement. It rests with the honor, the sense of fair play, and the true patriotism of those in the majority to wield this power

Rights of majorities and of minorities

<sup>1</sup>There is a good, general description of procedure in McCall, *The Business of Congress*. English procedure is briefly described in *The Liberal Year Books* and *The Constitutional Year Books*. See also Lowell, *The Government of England*, Vol. I, Chaps. XII-XVI; Ogg, *The Governments of Europe* (rev. ed.), Chap. XI, and references, and Sait, *Government and Politics of France*, Chap. VII.

with moderation and justice, albeit with firmness;<sup>1</sup> and it is equally a moral obligation upon those in the minority, while insisting upon their just rights, to refrain from unnecessary obstruction. In a government organized upon republican principles it is proper that in most matters the majority voice should control and that the rights of a minority should extend little beyond the opportunity to be fairly heard and thus by argument and persuasion to gain adherents and grow into a majority. Under the very best of conditions, representative legislatures cannot function efficiently unless all or the greater number of their members are willing to abide in good faith by the established rules of procedure, as well as by those unformulated understandings which may be termed the "rules of the game."

"Rules of  
the Game"

#### TOPICS FOR FURTHER INVESTIGATION

The Bicameral Theory.—Garner, *Introduction to Political Science* (and references); Sidgwick, *The Elements of Politics*; Bryce, *Modern Democracies*, and see above, pp. 234, 236.

Occupational Representation.—For references, see above, pp. 243, 244.

Hearings before Congressional Committees.—Lowell, *The Government of England and Public Opinion and Popular Government*; Reinsch, *American Legislatures and Legislative Methods*; Rogers, "American Government and Politics," *American Political Science Review*, Vol. XIII, p. 25.

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<sup>1</sup>See two articles by Speaker Reed, "The Limitations of the Speakership," and "Reforms Needed in the House," *North American Review*, Vol. CL, pp. 382, 537. Calhoun declared that the previous question had been ordered only four times in twenty years. The changes in the procedure of the House of Representatives are fully explained in Alexander, *History and Procedure of the House of Representatives*, Chapter X. See above, pp. 118, 119.

## CHAPTER XV

### PROPORTIONAL REPRESENTATION

THE question of legislative representation for minority parties deserves especial consideration, partly on account of its intrinsic importance, and partly because of the prolific discussion to which it has recently given rise. Proportional representation in some one of its many forms is spreading rapidly,<sup>1</sup> and soon there will be an adequate amount of experience with its workings to use in checking against the theoretical arguments.

Spread of  
Proportional  
Representa-  
tion

It is a striking fact that two long-fought political causes—Woman Suffrage and Proportional Representation—were greatly aided by the War. The first has now been almost universally won but its issues were so simple that the public could understand and approve. The representation of minorities, on the other hand, is rather complicated, and inability to comprehend how it will work is the chief reason for the delay in experimenting with it. Mr. Lloyd George, for example, told the House of Commons in March, 1917, when discussing the proposed introduction of a reform bill, that he had never been able to understand it, although a government of which he was a member had resorted to a modified form of the scheme in the Home Rule Bill of 1912.

Its com-  
plexity

There has always been a strong theoretical argument in favor of the representation of minority parties in order that the legislature may be really a mirror of the nation,<sup>2</sup>

<sup>1</sup>The most recent summary is by J. Fischer Williams, a leading English authority, in the *Journal of the Society for Comparative Legislation*, January, 1921.

<sup>2</sup>"Representative assemblies may be compared to maps. They ought to reproduce all the component parts of a country in their true proportions, and not permit the obliteration of the smaller elements by the larger."—MIRABEAU.

but recently proportional representation has been most strongly supported by conservative politicians who see in it a bulwark against a possible domination of the State by a labor party. It is interesting that the proposal in the Representation of the People Act of 1918 to try the scheme on 100 parliamentary seats was forced on the Commons by the House of Lords. The House of Commons rejected the proposal five times, but in the end was obliged to agree to a possible experiment with 100 seats in constituencies allowed from three to seven members. It will probably take a new House of Commons to put this provision of the act into force,<sup>1</sup> but the controversy between the two houses is of interest as showing that the upper chamber was more anxious for the innovation, and was supported by a conservative wing in the Commons. Thus, Lord Hugh Cecil frankly advocates proportional representation as a safeguard against revolution.

The danger is (he says) that what is called "direct action," that is, strikes with a political object, may be organized, and that these strikes may so far disorganize the economic mechanism of

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"Is it necessary that the minority should not even be heard? Nothing but habit and old association can reconcile any reasonable being to the needless injustice. In a really equal democracy every or any section would be represented, not disproportionately, but proportionately."—J. S. MILL.

"It is infinitely to the advantage of the House of Commons, if it is to be a real reflection and mirror of the national mind, that there should be no strain of opinion honestly entertained by any substantial body of the King's subjects which should not there find representation and speech."—THE RT. HON. H. H. ASQUITH.

"The indispensable preliminary to democracy is the representation of every interest."—G. BERNARD SHAW.

"The one pervading evil of democracy is the tyranny of the majority, or rather of that party, not always the majority, that succeeds, by force or fraud, in carrying elections. To break off that point is to avert the danger. The common system of representation perpetuates the danger. Unequal electorates afford no security to majorities. Equal electorates give none to minorities. Thirty-five years ago it was pointed out that the remedy is proportional representation. It is profoundly democratic, for it increases the influence of thousands who would otherwise have no voice in the Government; and it brings men more near an equality by so contriving that no vote shall be wasted, and that every voter shall contribute to bring into Parliament a member of his own opinion."—LORD ACTON. Quoted by J. F. Williams, *The Reform of Political Representation* (1918), p. ii.

<sup>1</sup>See Ogg, *The Governments of Europe* (rev. ed.), p. 133.



society as to produce widespread distress. Who can tell what would happen if a large part of the population were acutely distressed? A violent revolution is quite out of the question as long as people are neither hungry nor cold. But supposing direct action made them hungry and cold, as it easily might, is it certain that their good sense would then resist the propaganda which would not be idle in favour of disintegrating society altogether? The danger does not seem negligible. And if we were delivered from it as I hope we should be, it could only be by the stern and rigorous assertion of the authority of the law, and many severities in themselves odious and mischievous. From these evils we can only be securely and effectually preserved if we do not take even the first steps away from the ordered path of normal parliamentary government. Even a slight wandering would cost us much, for though we might return to the true way of wealth and progress it could only be by hard and dangerous steps.

The danger  
of Direct  
Action

I said that it is disappointing as well as alarming that we should be exposed to these dangers. Everyone recognises that there are defects in democratic representative government. But it has always been supposed that these defects are outweighed by the security obtained that a self-governing people will never be driven to revolution. . . . But it is disappointing to find that with all the evils of democracy we have as well an evil much greater than they, from which it was hoped democracy was immune—the danger of a revolutionary movement among the working classes of the community. We seem to have the evils of democracy, but somehow to have missed one of its great benefits.

It is obvious that this has happened because a large part of the people do not feel that the representative system really gives them their constitutional share in the control of the government of the country. They elect the House of Commons, but when it is elected they do not seem to trust it or regard its decisions.<sup>1</sup>

When single-member constituencies constitute the electoral basis, striking anomalies are possible. Thus, the elections for the Fifty-first Congress resulted in a Republican vote of 5,348,397, while the Democrats polled 5,502,581. The Republicans, however, secured a majority of the seats in the House of Representatives (164-161). In Pennsylvania, for the congressional election of 1920, the Republi-

Anomalies  
of existing  
electoral  
system

<sup>1</sup>“Proportional Representation,” *Contemporary Review*, December, 1919. Lord Hugh Cecil argues for the mild reform of proportional representation as against the radical reforms of the Webbs or the Guild Socialists. See above, pp. 243, 244.

cans elected one representative for every 46,000 votes, but the Democrats, polling more than ten times that number, elected no representatives at all.<sup>1</sup> In the elections as a whole, 5,400,000 voters cast ballots without helping to elect representatives.<sup>2</sup>

English  
elections  
and P. R.

In England, also, a general election may give a false impression of public opinion. The party with the majority in the House of Commons has actually had a minority of votes at the elections.<sup>3</sup> "In 1906 there was a sensational change in Parliament. A substantial Unionist majority was suddenly turned to a huge Liberal majority. But it was found that only 18 per cent. of the electors had gone over from one party to another. The great 'landslide' in Parliament was produced by a comparatively small movement of public opinion. So, too, was the extraor-

<sup>1</sup>The figures were as follows:

PENNSYLVANIA			
Party	Total Vote for District Representatives in Congress	Number of Representatives Elected	Number of Representatives in Proportion to Votes
Republican	1,114,983	35	24
Democratic	510,977	0	10
Prohibition	78,129	1	1
Socialist	62,481	0	1
Others	24,817	0	0

Other striking results of the single-member-district system were the following:

Party	State	Total Party Vote for Representatives in Congress	Representatives in Congress Elected
Republican	Nebraska	222,060	6
Republican	North Carolina	225,368	0
Democratic	Arkansas	127,482	7
Democratic	Tennessee	190,152	5
Democratic	New Jersey	295,260	1
Democratic	Pennsylvania	510,977	0

See *Proportional Representation Review*, January, 1921.

<sup>2</sup>For an excellent criticism of the American electoral system, see Hugins, "The New Need for Proportional Representation," *The Unpartizan Review*, March-April, 1920. This article also discusses the expedients of a cumulative, limited, and single vote (Japan). See also, Garner, *Introduction to Political Science*, p. 458 and references.

<sup>3</sup>E. g., in the general election of 1886, when the Unionists, with 2,049,137 votes, had 387 seats, and the Liberals, with 2,103,954 votes, had only 283 seats.

dinary victory of the Coalition in 1918. The Coalition Government had by no means a large majority among the voters, but it secured an unprecedented majority of seats in the House of Commons. And at almost every general election the party in power has a strength in Parliament out of proportion to its following in the country. Many people, indeed, regard this state of affairs as a positive advantage, because a government needs a strong following in Parliament in order to carry out its programme, and it is both troublesome and risky to work with a very small majority. Our decision on this point will depend on our view of the present party system.”<sup>1</sup>

The election  
of 1918

<sup>1</sup>Conrad Gill, *Government and People*, p. 221. Detailed figures on the results of the election of 1918 are quoted by Lord Hugh Cecil (“Proportional Representation,” *Contemporary Review*, December, 1919), from *Representation* (March, 1919), the journal of the Proportional Representation Society.

GREAT BRITAIN  
*Contested Seats (Excluding Universities)*

Parties	Seats Polled	Seats Obtained	Seats in Pro- portion to Votes
COALITION AND ALLIED:—			
Coalition Unionist	3,488,543	... 285	... 184
Coalition Liberal ..	1,419,992	... 103	... 73
Coalition Labour. .	48,057	... 3	... 3
National Democra- tic Party ...	230,912	... 12	... 12
Independent Union- ist ...	375,914	... 25	... 20
Total Coalition..	5,564,318	... 428	... 292
NON-COALITION:—			
Liberal ...	1,282,122	... 25	... 67
Labour ...	2,292,102	... 47	... 120
Socialist...	24,889	... 1	... 1
Farmers...	14,768	... —	... 1
Coöperatives ...	51,133	... 1	... 3
National Party ...	84,322	... 2	... 4
Nationalists ...	8,225	... —	... 1
Discharged Soldiers and Sailors ...	83,637	... 1	... 4
Independents ...	291,714	... 4	... 16
Total Non- Coalition ...	4,132,912	... 81	... 217
Majority for Coali- tion...	1,431,406	... 347	... 75

In working out these totals for Great Britain, the figures for England, Wales, and Scotland have been taken separately, as the “quota” per member slightly differs.

This table is not statistically quite satisfactory, as the Independent Unionists

On the other hand—and this is the argument of proportionalists—representation is secured in theoretical perfection when each political group elects a number of delegates in exact proportion to the vote it polls. If, for example, there are eight members to be chosen by 80,000 electors, and three parties which poll 50,000, 20,000, and 10,000 votes respectively, then the proper result is not eight representatives for the majority party, but a division of the delegation into five, two, and one members, so that every voter will be represented.

Hare and  
Mill

To determine such a proportion, 300 schemes have been advanced.<sup>1</sup> The first to attract a great deal of attention was that of Thomas Hare, who in 1857 published his pamphlet on *The Machinery of Representation*. Perhaps under the influence of an experiment which had been tried two years previously in Denmark, Hare argued for the principle of a single, transferable vote, and in 1859 issued his larger treatise on *The Election of Representatives*. This scheme was taken up by John Stuart Mill in his *Representative Government*.

For the operation of the Hare system, a constituency returning several—preferably more, but never less, than

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are, of course, as their name indicates, not strictly supporters of the Coalition, and it would be difficult to assign the National Party, the Discharged Soldiers and Sailors Party, and the Independents, either to the Coalition or to its opponents. But these are small matters which make no substantial difference. It will be seen that the uncontested seats are not included in this table, nor are the Universities nor the Irish seats. There were eighty-two uncontested seats in Great Britain, and if the Coalition be allowed three fourths of these and their opponents the remaining fourth, that will give the Coalition sixty-three instead of the sixty-nine actually returned, and the non-Coalition nineteen instead of the thirteen actually returned. The Universities are supposed to be already elected by Proportional Representation, although the system works very imperfectly owing to the limited number of representatives for each University constituency. All the eleven University members for Great Britain were either Coalition Unionists or Coalition Liberals.

The peculiar circumstances of Ireland would make it necessary to examine the Irish statistics separately; and the resolution of the Sinn Fein members not to take their seats makes the larger part of the representation of Ireland unimportant.

<sup>1</sup>For a description of some of them see J. H. Humphreys, *Proportional Representation* (London, 1911).



three—members is necessary. Each citizen is given a single vote, but he indicates his preference by numbering his candidates, first, second, and third choice, etc. The “quota”<sup>1</sup> is determined and then, when the votes are counted, the candidate is given just the number of first choices necessary to fill his quota, the remaining ballots cast for him, being counted with respect to their second choices for the candidates named, and so on.<sup>2</sup>

Another scheme, not liked so well by the proportional representation advocates, is the so-called “list system.” This gives recognition not only to the individual voter, but allows him to express his opinion for a party. Tickets are nominated containing as many names as there are places to fill, and the citizen can scatter his votes among the different parties if he wishes. Thus, in a constituency electing ten delegates and polling 60,000 votes, suppose that three parties get the following support: Conservatives, 30,000; Liberals, 18,000, and Socialists, 12,000.

The “List System”

<sup>1</sup>The ‘quota’ is the smallest number of votes that makes the election of a candidate certain; any candidate who obtains the quota is at once declared elected. In a single-member constituency the quota would be one more than half the votes, or  $\frac{\text{number of votes}}{2} + 1$ ; in a two-membered constituency,  $\frac{\text{number of votes}}{3} + 1$ ; thus the rule for ascertaining the quota is to divide the number of votes by one more than the number of seats, and (neglecting fractions) add one to the result.” Williams, *The Reform of Political Representation*, p. 33 n. See below, Appendix.

<sup>2</sup>For a full discussion of the method of transfer, illustrated by a model election, see Williams, *op. cit.*, p. 32 ff. The system is also fully explained in the rules as determined upon by the Government Draftsman for the Representation of the People Act, 1918, which are reprinted below, in the Appendix.

“The Tasmanian system of distributing the surplus votes is slightly different from that adopted in the British Rules (see below, Appendix). In the Tasmanian Rules every transferable paper is carried forward at the fractional value which represents the portion of the vote not required for building up the quota of the successful candidate, and there is not, as in the British Rules, a selection made of certain definite papers to be carried forward at the value of unity. The number of votes credited to the transferee is ascertained by multiplying the number of papers to be transferred to him by this ‘transfer value.’ The number thus ascertained usually contains a fraction which is disregarded, with the result that a few votes are lost in the process of transfer. In the British Rules no votes are lost; the largest fractional remainders, up to the number of the votes that otherwise would be split into fractions and lost, are treated as of the value of unity.” Williams, *op. cit.*, p. 40 note.

The electoral quotient would be 6001 (60,000 divided by the number of seats) and the Conservatives would elect five members, the Liberals three, and the Socialists two. Without proportional representation it would be possible for the Conservatives to elect a complete ticket with but little more than half of the electorate supporting them. The difficulty is, however, that elections do not result in such convenient round numbers, and there are various schemes for computing the value of remainders and giving credit to party and personal opinion.<sup>1</sup>

Electoral  
Reform in  
France

A word should also be said about the new (1919) French electoral law. Although it is entitled "a law . . . to establish the general ticket with proportional representation," "strictly speaking," says Professor Sait, it "does not establish proportional representation at all." It "takes the form of an uneven compromise between proportional representation and the *scrutin de liste* giving to the former a very subordinate place."<sup>2</sup>

Representa-  
tion of the  
People Act

Recent experiments with proportional representation, as has already been said, have been astonishingly numerous. Under the Representation of the People Act, it is used for the eleven University seats. It is also resorted to for the election of the two parliaments under the Government of

<sup>1</sup>Vincent, "Proportional Representation," *Cyclopaedia of American Government*, Vol. III, p. 80. For a full discussion of list systems, see Humphreys, *Proportional Representation*, Chap. VIII, and on Belgium, Ogg, *The Governments of Europe*, (1st. ed.), p. 542. It is worthy of note that English-speaking countries seem to prefer the single transferable vote while continental countries incline to the list system.

<sup>2</sup>Sait, *Government and Politics of France*, p. 156. There is an excellent summary of the controversy over *scrutin de liste* and *scrutin d'arrondissement* and of the objections to single-member constituencies in Sait, Chap. VI. See also, Garner, "Electoral Reform in France," *American Political Science Review*, Vol. VII, p. 610. The text of the French law is given in Sait, p. 450.

The workings of the French law are described in the following explanation of the system, based on a bulletin issued by the Ministry of the Interior:

"To illustrate, let us take a department which is to elect six deputies, and whose total number of voters is 60,240. All candidates receiving as many as 30,121 votes, *i. e.*, an absolute majority of the whole vote cast, are forthwith declared elected, up to the number of seats to be filled. To ascertain which other candidates have been successful (if any seats remain), we must apply the electoral quotient. Dividing the total vote by the number of deputies to be

The Gov-  
ernment of  
Ireland

Ireland Act, and has had a remarkable vogue throughout the British Empire. New Zealand in 1914 adopted the single transferable vote for the election of the Legislative Council, each island being divided into two large constituencies. The first election under the Hare system of the Legislative Assembly of New South Wales took place in March, 1920; the Winnipeg election of June, 1920, involved 48,246 ballots, until then, the largest number which had been polled under the Hare system. The draft constitution of Malta, prescribed by the British Government in June, 1920, introduced the single transferable vote, as

elected, we find the electoral quotient to be 10,040. Let us suppose that four lists, A, B, C, and D, are represented, with the following results:

	A	B	C	D
Candidate 1 . . .	32,645	18,125	15,247	5,164
Candidate 2 . . .	29,827	16,247	14,629	4,032
Candidate 3 . . .	29,640	15,822	12,172	3,292
Candidate 4 . . .	25,274	12,659	8,624	1,123
Candidate 5 . . .	18,401	8,404	6,018	1,119
Candidate 6 . . .	12,524	4,031	5,101	1,028
Totals . . . .	148,311	75,288	61,791	15,812
Average . . .	24,718	12,547	10,298	2,635

"It is evident that the first candidate of list A is elected, because he has an absolute majority of all the votes cast. Thereafter, each list will receive as many seats as its average contains the electoral quotient, *i. e.*, list A will receive two seats, since its average contains the electoral quotient twice; list B will receive one seat; list C will receive one seat; and list D will receive none. Four seats have thus been allotted by the proportional method, and one has been obtained by absolute majority. But the department is allowed six seats; and the final one is accorded to the list having the largest average, namely, list A.

"After the seats are thus assigned to the lists, they are assigned to the candidates in each list in accordance with the number of votes they have individually received. Thus in our example the first, second, third, and fourth candidates of list A, and the first candidate of list B and list C, would be elected. In case of a tie within a list, the eldest candidate gets the seat.

"The law prescribes that no candidate may be declared elected unless his vote is greater than one half of the average of the list to which he belongs. Furthermore, if the number of persons voting is not greater than one half of the number registered, or if no list obtains the electoral quotient, no candidate is to be declared elected.

"Under these circumstances a new election must be held two weeks later; if in this election no list obtains the electoral quotient, the seats are assigned to the candidates receiving the largest vote. However, it can readily be seen that it is the purpose of the law (and the results at the recent elections have justified the expectations) to reduce the ballotage, or second ballotings to a minimum." Stuart, "Electoral Reform in France and the Elections of 1919," *American Political Science Review*, February, 1920.



being, in Lord Milner's words, "the best calculated to secure the fairest and most exact representation of all parties and points of view, and to give the widest choice and therefore the greatest measure of political power to the voter and to bring about the return of the best men of all parties."

Lord Mil-  
ner's opin-  
ion

The method of proportional representation by list, recommended by the National Assembly for the Senate, though calculated to secure a fairer representation of parties than the ordinary method of election by single-member constituencies, is still from the point of view of the voters' choice, and the return of independent men of character who may not happen to be on a party list, inferior to the method chosen. The method is one which is being increasingly adopted, more particularly in the British Empire. The State of New South Wales, for instance, following the example of Tasmania which adopted it some years ago, has recently applied it to the elections for its Legislative Assembly, and it has been included in the new Home Rule Bill for Ireland as the result of the experience gained by its working in Irish municipal elections. Now that the people of Malta are to be entrusted with the control of their own affairs it is obviously desirable that they should be given the most effective method of expressing their wishes as a free community which the experience of other self-governing communities has suggested.<sup>1</sup>

The British  
Empire

In Canada, proportional representation is being increasingly used. Special committees of the Canadian House of Commons and the Ontario Legislative Assembly were appointed recently (1921) to consider electoral changes, and the latter body recommended that the Hare system should be tried in certain constituencies. Vancouver held its first election on January 13, 1921. In South Africa a Parliamentary Commission has reported in favor of a Senate of 44 members, 32 of whom will be elected by proportional representation, eight from each province. In India, the system has been prescribed for three consti-

<sup>1</sup>Despatch—Malta, No. 151, May 28, 1920, quoted, *Proportional Representation Review*, October, 1920.



tuencies of the new Indian national and provincial legislatures, and in New Zealand, 24 members of the Legislative Council are chosen by the Hare system from two seven-member, and two five-member constituencies.

Outside the British Empire, the spread of the system has been even more striking. Germany, Jugo-Slavia, Sweden, Greece, Czechoslovakia, Austria, Poland, the Georgian Republic, and Uruguay are among the states which can be added to Belgium, Italy, Holland, Switzerland, and Denmark—all old experiment stations for forms of proportional representation. In the United States, Sacramento is the largest of the three cities which have adopted proportional representation. Ashtabula, Ohio, and Boulder, Colorado, are the other two cities, Kalamazoo having been forced to abandon the plan on account of a decision of the state Supreme Court.<sup>1</sup>

European  
experi-  
ments

Arguments against proportional representation are, of course, both numerous and serious. The chief objection is probably the system's complexity; it cannot really be understood by the statesman (or the student) who does not participate in a model election and actually allocate the second and third choices.<sup>2</sup> Other objections hold that proportional representation would give small majorities; that it would substitute groups for the party system; that improper bargains would simply be transferred from the constituencies to the legislature; that the personal and human tie between a member and his constituents would be weakened; and that the cost would be prohibitive.<sup>3</sup> Most of these objections are conjectural, and can only be answered after the system has been tried out more exten-

Arguments  
against  
P. R.

<sup>1</sup>For accounts of the spread of proportional representation, see current issues of the *Proportional Representation Review* (Proportional Representation League, Philadelphia, Pa.)

<sup>2</sup>See the description of an experimental election in the Appendix, below. The books by Humphreys and Williams (referred to above) have numerous detailed explanations of the different schemes.

<sup>3</sup>See Williams, *The Reform of Political Representation*, p. 62 ff. and Wallas, *Human Nature in Politics*, p. 217 ff. See also. Wells, *In the Fourth Year*.

Spread of  
system re-  
markable  
phenom-  
enon

sively.<sup>1</sup> Certain it is, however, that the recent rapid spread of the system, not only to provide for special cases, as in Ireland, or to protect racial minorities, as in the succession states, but also to enable a legislature to mirror more effectively the varying political views of an electorate, is one of the most remarkable phenomena of current politics.

### TOPICS FOR FURTHER INVESTIGATION

The Representation of Minorities.—Bryce, *Modern Democracies*; Garner, *Introduction to Political Science*; Commons, *Proportional Representation*; Lecky, *Democracy and Liberty*.

Plural Voting.—Garner, *Introduction to Political Science*; Ogg, *The Governments of Europe*; Lowell, *Governments and Parties in*

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<sup>1</sup> As applied to England, a recent sympathetic writer summarizes the objections to proportional representation as follows:

1. It will mean small parliamentary majorities.
2. Small minorities will be unduly represented.
3. Equal electoral districts with single members would give equally good results.

4. Proportionalism would multiply groups and break up the large parties.
5. It would greatly increase the costs of candidates in the constituencies to which it would apply.

6. It would break down in the case of by-elections.
7. It would create jealousies among the candidates of the same party running together, as each would be seeking first preferences.

8. It would lower the quality of representation, notably in the case of London, whose representation has greatly improved under the system of single-seated constituencies." J. M. Robertson, "Proportional Representation," *Edinburgh Review*, July, 1917. The experience of Belgium is against the first and fourth objections. With regard to the second point, it can be said that the representation would be proportional and the minority would be entitled to it. Equal districts with single members would be an aggravation of the evils which exist, the anomalies in the United States under such a system probably being greater than those elsewhere. Costs could either be limited by law, or charged, in a greater degree, to the State. There is no evidence that the quality of representation would be lowered. The only real objections are those relating to by-elections, and the destruction of the two-party system, with its greater possibilities of political responsibility. With respect to the first objection, it would seem that if the place to be filled belonged to a minority party, its cause at a by-election of one member would be hopeless. But it has been suggested that an agreement for a truce in such cases might preserve the seat to the party which had secured it at the general election—at least when the vacancy occurred on account of death. Only time can tell whether the possible break down of the two-party system would be too high a price to pay for the benefits which proportional representation is likely to afford.

## PROPORTIONAL REPRESENTATION 275

*Continental Europe*; Mill, *Representative Government*; Sidgwick, *The Elements of Politics*; Seymour and Frary, *How the World Votes*; and see above, p. 242.

Compulsory Suffrage.—Garner, *Introduction to Political Science*; Lieber, *Political Ethics*.

Electoral Reform in France.—Sait, *Government and Politics of France*, and references.

## CHAPTER XVI

### BUDGETARY PROCEDURE AND REPRESENTATIVE GOVERNMENT<sup>1</sup>

WITH regard to the raising, appropriation, expenditure, and accounting of the public revenues, a number of most important determinations have to be made: By what processes may the financial needs of the Government be best determined? how may these needs be best met? how may expenditures be most economically and efficiently made? and how may the spending authorities be best held accountable for the manner in which they exercise the powers vested in them?

Control of  
the Purse

With reference to this last question, it is of course necessary under any government by law, that administrative officials should be held to a strict legal responsibility, civil and criminal, for all acts committed by them for which there is no legal warrant. But the accountability that is meant is political in character—an accountability to the governed or to their representatives in the legislature. Leaving aside, then, the part to be played by the courts through their criminal jurisdiction or through the employment of such civil writs as those of *certiorari*, *mandamus*, *injunction*, *quo warranto*, and the like, and passing by matters of bookkeeping, audit, and reports, the problem of properly administering the finances of a State is essen-

<sup>1</sup>For an adequate bibliography on the methods of financial legislation see W. F. Willoughby, *The Problem of a National Budget* (1918), and other volumes issued by the Institute for Government Research, Washington, D. C.; *Hearings before the Select Committee on the Budget of the House of Representatives on the Establishment of a National Budget System*, 66th Congress, 1st Session (containing a number of important documents and several valuable discussions of the British system); *Reports from the Select Committee on National Expenditure*, 151, 167, 188 (1917); 23, 30, and 59 (1918); Davenport, *Parliament and the Taxpayer* (1919); and Durell, *Parliamentary Grants* (1917).



tially one of determining the respective parts to be played by the executive and legislative branches of the government.

In a popular government it has been seen that the body of elected representatives has two distinct functions to perform. These are: (1) to give the final and legal sanction to public policies; and (2) to operate as an organ of direction and control of the other branches of the government.

As the organ for giving final and legal sanction to public policies its work is legislative in character. As thus functioning it is not essential, and perhaps not desirable, for it to attempt, except in part, to initiate the policies which are to be adopted. In those countries where responsible parliamentary government prevails, the executive takes the leading part in the initiation of legislation; but even under the presidential type such as exists in the United States, there is no constitutional or imperative political reason why public measures should not be initiated and given preliminary formulation by the executive and great weight given by the legislature to his recommendations. At the present time, his recommendations are frequently viewed with suspicion, and, in a technical sense, he has no power of initiation. In any case it is proper—indeed from the standpoint of governmental efficiency it is imperative—that the legislative body should obtain from the executive such information as is required in order that it may wisely and intelligently exercise its policy-determining duties.

In order to function as a board of supervision and control it is essential that the body of elected representatives should not only give the general orders which are to control the administrative services, but that it should hold those services strictly responsible for the manner in which these orders are executed. In issuing its orders to the other branches of the government it is always a question of policy as to how detailed and rigid the legislative commands thus

Relation of  
Executive  
and  
Legislature

Function of  
Executive

Control by  
Legislature

given shall be. Where the orders are precise and minute in their specifications there is, of course, less opportunity given to those to whom they are directed to misinterpret or defeat the legislative will. Upon the other hand, the executive is thus deprived of authority to exercise a wise discretion as to the action to be taken under conditions of fact that may arise and which it is impossible for the legislature to foresee and specifically provide for, or to employ an expert judgment with reference to matters concerning which, from the nature of the case, it is impossible that the legislative body should have an accurate knowledge. It would therefore appear that, as thus viewed, the demand for legislative control upon the one hand, and the desirability of administrative efficiency upon the other hand, make necessary a reasonable mean between meticulous particularity and broad generality in statutory commands.

Enforce-  
ment of  
administra-  
tive respon-  
sibility

As regards the accountability to which the administrative branches of the government should be held by the legislature, it may be said that the more strictly this is enforced, the more feasible it becomes to grant in the beginning wide discretionary, administrative powers. The means by which this accountability may be compelled are of two kinds: by the provision of competent judicial tribunals and appropriate writs or causes of action for preventing or correcting or providing punishment for *ultra vires* or other illegal acts upon the part of public officials; and by compelling the rendition to the legislature of annual or special reports giving in sufficient detail all administrative action that has been taken. The reports thus rendered, whether financial or otherwise, besides being a means of enforcing accountability, serve also, it may be observed, as a source from which the legislature can obtain information needed by it for the formulation of policies and the issuance of orders that are to guide and control the administration's future action.

Publicity in matters of public administration is thus of the essence of popular government. Only through publicity may be secured the knowledge that is needed in order that present and future action may obtain the benefit of the lessons taught by the past, and without publicity, political as well as legal responsibility upon the part of those entrusted with official authority cannot be enforced.

Publicity is  
essential

Chief among the public policies of a State are those connected with its revenues and financial expenditures.<sup>1</sup> Indeed, there are very few forms of governmental action which do not have their financial side. The revenues that must be raised are determined in their amount, if not in their kind, by the expenditures that are authorized, and these, in turn, are determined by the duties the performance of which the legislature authorizes the other branches of the government to undertake. And, reciprocally, of course, the probable cost of a public undertaking nearly always enters as an important, and often as a controlling, consideration, in determining whether or not it shall be entered upon. It may, therefore, be said that the machinery and procedure which a legislative body employs, and the principles by which it is guided in the exercise of revenue-supplying, fund-granting, and expenditure-controlling functions, constitute the central and dominating feature of a system of representative government, and that by their character are determined not only the wisdom and honesty with which public policies will be determined, but,

Importance  
of financial  
questions

<sup>1</sup> On the connection between financial necessity and the development of representative political institutions, see Jenks, *The State and the Nation*, Chap. XI. "By a slow and painful and at times violent process the House of Commons has evolved a system which is intended to secure to it that effective hold of the purse-strings to which its own survival is mainly to be attributed. England, it should be remembered, was not alone in the development of representative institutions in the thirteenth century. The Cortes of Aragon, the Cortes of Castile, the States-General of France were the rivals in antiquity of the English Parliament. By the middle of the seventeenth century the English Parliament alone survived, and its survival must be ascribed primarily to the fact that it secured, as the States-General and the Cortes never did, the power of the purse. The long process of evolution reached its culmination in the passing of the Exchequer and Audit Act of 1866. That Act is the corner stone of the existing edifice." Marriott, "The Power of the Purse," *Nineteenth Century*, August, 1917.



in very large measure, the economy and efficiency with which they will be executed.

#### Essentials of a Budget

Under all systems of public financial administration the legislature or fund-granting organ of government is supplied by the executive with a certain amount of financial information. In order, however, that the documents in which this is furnished may be said, collectively, to constitute what is termed a "Budget,"<sup>1</sup> it is necessary that the information which they contain should cover certain points, and that taken together they should be made to serve as a basis for a general financial programme for the next ensuing fiscal period. When, then, a budgetary procedure is said to be employed by a State, it is meant that the following features appear in its system of financial administration:

First, that the legislature is furnished by the executive with the information needed by it for the intelligent performance of its function as the policy-determining organ of the government.

Second, that the legislature is aided by having presented to it a financial programme framed by the executive, for the wisdom of which he assumes personal and political responsibility.

Third, that the legislature accepts the executive programme thus presented to it as a working basis for its own action.

#### Functions of Executive and Legisla- ture

If this third feature were absent<sup>2</sup> it might be possible for

<sup>1</sup>There are few terms in political nomenclature which have been used with such indefiniteness of meaning as has the word Budget. Frequently it is employed to designate the general appropriation act by which provision is made for the expenditure needs of a government for the next fiscal period. At other times it is used to indicate the revenue programme presented by the executive for meeting the demands that are to be made upon the public treasury. In a third sense, it is applied to the material presented by the executive to the legislature for its information and guidance in determining its general financial programme for the next fiscal year. It is in this third sense that the term is here employed.

<sup>2</sup>This, indeed, was exactly the situation in the United States in 1913 when President Taft submitted to Congress what could properly be termed a Budget, but to which that self-sufficient and independent-minded body paid no attention.



a State to have a budget without having its finances administered according to a system of budgetary procedure.

The United States has operated without a budget, or, indeed, without any approach to a budgetary procedure. Congress has never obtained from the executive the information which it is entitled to have and which is indispensable if intelligent and wise financial legislation is to be enacted. The estimates submitted have been but a mechanical compilation of the requests from the several spending services, each of which is bent upon obtaining for itself all that is possible from the public purse. That is, before submission to Congress their requests have been subjected to no central supervision in order to see that their items are reasonable in amount, or that, when aggregated, they bear a proper relation to one another and, in their grand total, are proportioned to the estimated or possible financial resources of the government as determined by a programme of revenue legislation. The Secretary of the Treasury has thus played the part merely of an agent of transmission, and the President has played no part whatsoever, the only functions which Congress has seen fit to impose upon him in the premises being that in case it appears that there will be a deficit, he shall "advise the Congress how in his judgment the estimated appropriations could with least injury to the public service be reduced so as to bring the appropriations within the estimated revenues." This provision dates only from 1909, and it may be said that the Presidents have not seen fit to pay any attention to the obligation thus imposed upon them. The reason for this probably is that they have seen the futility of making recommendations, well knowing that Congress would attach no value to them, and that, in fact, despite the legislative declaration, would not welcome them. For the same reason, the Presidents have not made use of their constitutionally recognized right and duty to "give to the Congress information of the

Congressional control of finance

Attitude of American Presidents

state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient," in order to present a formulated and comprehensive financial programme for congressional consideration.

Divided  
authority in  
the House

Not only has Congress failed to provide for the keeping and submission to itself by the executive of the fiscal information which is indispensable to intelligent legislation, and shown in an unequivocal manner that it will not receive with cordiality an executively prepared fiscal programme, but it has not even organized itself in such a manner as to centralize responsibility in a budget committee of its own creation, with jurisdiction over revenue measures as well as acts carrying appropriations. Until 1920 appropriations were not placed within the control of a single committee (of the House), but were distributed among eight or more separate committees.<sup>1</sup>

Recent  
changes in  
rules

At the second session of the Sixty-sixth Congress, Congress passed a bill creating a budget system which, as has already been said, was vetoed by the President on the ground that it unconstitutionally limited his power of appointment by seeking to prevent it from including the power of removal. The House of Representatives, nevertheless, changed its rules so that all appropriation laws would be considered by a single Committee on Appropriations, consisting of 35 members. The new rules also provided that if a bill came back from the Senate with amendments granting funds not already authorized by law,<sup>2</sup> the conference report should not "be agreed to by the managers on the part of the House unless specific authority

<sup>1</sup>The Appropriations Committee handled the Legislative, Executive and Judicial, the Sundry Civil, Fortifications, the District of Columbia, and Pensions bills; the Military Affairs Committee, two bills for the Army and the Military Academy, and the Agricultural, Foreign Affairs, Naval, Post Offices, and Indian Affairs Committees had authority to report appropriations for these purposes. Under clause 56 of rule 11 of the House of Representatives, the River and Harbors Committee had the authority to report (at any time) "bills for the improvement of rivers and harbors." This is changed by the new rules so that the committee has the right to report "bills authorizing the improvement of rivers and harbors." The power to report appropriations is thus taken away.

<sup>2</sup>This was prevented by Rule 21, Clause 2.

to agree to such amendment shall be first given by the House by a separate vote on every such amendment."<sup>1</sup> In this manner the House sought to protect itself against senatorial coercion, and at the short session of the Sixty-sixth Congress, the House was able, in a number of cases, to force the Senate to give way on particular appropriations.<sup>2</sup>

With respect to the absence of any budget system, the American practice has been in sharp contrast to that of all other modern constitutional States.<sup>3</sup> In them all the annual estimates of financial needs for the coming fiscal

American  
practice  
exceptional

<sup>1</sup> On May 27, 1920, the Senate amended its rules so that, instead of having 17 or 19 members (in the case of the Appropriations Committee it is 20) as at the present time, all the principal committees of the Senate will consist of 15 members. The others will consist of 11, 9, and 7 members. Rule 25 of the standing rules of the Senate. See *Congressional Record*, May 27, p. 8335.

<sup>2</sup> Experience during the short session seemed to indicate that the changes were decidedly for the better. Every important Senate amendment carrying legislation was laid before the House and on each amendment the House took a separate vote. The time required was not great and in the opinion of Congressman Good (see *Congressional Record* March 4, p. 4743) "this very wholesome rule has forced the Senate to respect the rules of the House. The retention of this rule and the strict enforcement of it will maintain for the House its proper place in the legislation of the Congress."

During the session, however, there were a number of objections to the single Appropriations Committee. The criticisms came, for the most part, from members of the committees which had previously had charge of the different appropriation bills and who, under the new system, had lost some of their prestige. It was said that 35 men ran the House, that the 150 men who worked hard on these ousted committees "might as well be given a time table and told to go home. The 35 men on the Appropriations Committee would even take their proxies and their return would not be necessary." See *Congressional Record*, Feb. 11, 1921. This suggestion was made facetiously, and apparently no congressman realized that this is, in fact, the practice in the French Chamber of Deputies. "Only since 1885 have the names of deputies voting in a division been regularly recorded and published. Voting is by ballot-papers of two colours, white denoting assent, blue disapproval. These are collected into an urn passed around by the attendants. A deputy may abstain from voting, though present in the Chamber, and can even vote by proxy, entrusting the function of dropping into the urn his paper to a friend who will vote white or blue according to what he conceives to be the wishes of his colleague. A case was mentioned to me in which an obliging deputy deposited the votes of more than thirty of his colleagues." Bryce, *Modern Democracies*, Vol. I, p. 247.

<sup>3</sup> See Lord Bryce's discussion of "Congressional Finance," *The American Commonwealth*, Vol. I, p. 176. "Under the system of congressional finance here described America wastes millions annually. But her wealth is so great, her revenue so elastic, that she is not sensible of the loss. She has the glorious privilege of youth, the privilege of committing errors without suffering from their consequences," (p. 184). See also the very interesting discussion by Professor Henry Jones Ford, *The Cost of Our National Government*.



year are brought before a central authority for revision in order that their various items may be properly proportioned to one another and to the current or proposed revenues of the State; and, as a result of this scrutiny definite proposals to the legislature are made by the executive which carry great weight.

Just what weight should be given in the legislature to the proposals of the executive contained in the Estimates is, of course, a matter of very great importance. Indeed upon this, more than upon any other one point, the actual character of the constitutional government which a State is to have, may be said to depend.

English  
methods

In England, the financial proposals of the executive are practically controlling upon the legislature. By a self-denying ordinance which has been continuously in force for more than two hundred years, the House of Commons has declared that it "will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the consolidated fund or out of money to be provided by Parliament, unless recommended by the Crown."<sup>1</sup> This leaves it still within the power of the Commons to reject or reduce items of expenditure recommended by the executive,<sup>2</sup> but, in fact, so strictly does

<sup>1</sup>See W. F. Willoughby, W. W. Willoughby and S. M. Lindsay, *The System of Financial Administration of Great Britain*.

<sup>2</sup>Parliamentary examination of estimates may be inadequate in normal times, but during the war it was not even attempted. The House did not know how much the war was costing. To each Vote of credit, on the paper showing the sum required, the following note was added:

"NOTE.—The Vote of Credit is intended to cover not only the cost of Navy and Army Services and warlike operations but also all expenditure which may be necessary or desirable in view of the conditions created by the war, *e. g.*—

"(1) Payments under guarantees given by the Treasury for the purpose of the restoration of credit, the encouragement of trade and industry, and to facilitate the raising of funds by His Majesty's dominions or protectorates outside the United Kingdom and by Allied Powers, and repayment to the Bank of England of advances made by them at the request of His Majesty's Government for such purposes.

"(2) Advances by way of loans or grants for purposes connected with the war, and to local authorities and other bodies for undertaking public works for the relief of distress.



the party system operate, that the entire financial programme of the Ministry is always adopted without substantial change, and, indeed, without discussion of many of its proposals.<sup>1</sup> And, as regards revenue measures, so certain it is that executive proposals will receive legislative approval, their provisions are put into force immediately after they are made public in the so-called Budget Speech of the Chancellor of the Exchequer. The legality of this practice having been denied a few years ago in the courts,

Dominance  
of Executive

"(3) Advances by way of temporary loans to provide funds which would otherwise be raised by the issue of securities guaranteed by Parliament.

"When the Vote of Credit is used to finance the purchase and resale of food-stuffs or materials or for other operations undertaken in the public interest, which involve an immediate outlay recoverable in whole or in part by sales to the public, receipt of insurance premiums, or otherwise, advances for these purposes will be made from the Vote from time to time to separate accounts, and the receipts will be credited to these accounts, the net expenditure only being charged to the Vote of Credit. Any balances standing to the credit of these accounts when they are finally closed will be paid to the Exchequer."

Concerning this procedure an English critic wrote:

"Never was a graver announcement of a financial kind made to the House of Commons. Remembering the capacious maw of war too, that last sentence, suggesting a possible balance from Votes of Credit, to be repaid to the Exchequer is one of the leading instances of mockery in the English or any language. But the meaning of that note is not seen wholly except from a Parliamentary standpoint, coupled with a knowledge of Parliamentary practice. To vote £3,854 millions of war credit is a serious thing, and to be told that some of the money thus raised will be used to finance things not directly applied to waging the war, but yet connected with the state of war, such as the support of credit in general, loans to Dominions and to Allies, the purchase of sugar and corn, and other supplies, is all to the good; and it will always be a matter of much interest in the record of this war how the House never failed to grant the immense sums of credit that were demanded in a long series. Yet from a prudent financial point of view, from the usual Parliamentary standpoint, that note, and the whole system of these credits, marks a grave departure. This condition of things has arisen from the exigencies of war-time." W. M. J. Williams, "Parliament and Expenditure," *Contemporary Review*, June, 1917. In the United States, the same situation existed. Congress desired a Committee on the Conduct of the War, but this was objected to by the President.

<sup>1</sup>The estimates of expenditure are framed by the different departments and then are sanctioned in detail by the Treasury. They are generally passed on by the Cabinet and are proposed to the House of Commons in Committee of Supply. The objections to this procedure—as will be seen from the criticisms quoted—are that the Treasury—now a spending department—is not the proper agency to revise (in the interests of economy) the estimates of the other departments, and that the House ought to scrutinize more carefully than is permitted by the time and manner of its consideration, and ought to be allowed to reduce proposals, without the Government considering its action as a vote of no confidence.

a permanent act of Parliament was passed specifically legalizing the practice.<sup>1</sup>

The failure of the House of Commons,<sup>2</sup> however, as has been said, to act as a brake on an extravagant executive, has given rise to frequent protests<sup>3</sup> and to a voluminous discussion of possible reforms. In the words of a recent Cabinet Member:

Parliamen-  
tary pro-  
digality

The causes that render futile all our elaborate financial procedure are easily perceived. In the first place, the estimates, the accounts of the Departments, and the Money Resolutions for Bills, are framed in such a form that they signify little. They do not supply sufficient information to enable any judgment to be formed as to whether the administration of old services, or the plans for new ones, are economical or not. Next, the methods of the House of Commons for examining the merits of a proposed expenditure are obviously inadequate. It is plain that an assembly of seven hundred members, with no opportunity for hearing witnesses or inspecting establishments; with no reports before it from any committee which has had that

<sup>1</sup>"It is not surprising that there has not been a single instance in the last twenty-five years when the House of Commons by its own direct action has reduced, on financial grounds, any estimate submitted to it. . . . The debates in Committee of Supply are indispensable for the discussion of policy and administration. But so far as the direct effective control of proposals for expenditure is concerned, it would be true to say that if the estimates were never presented, and the Committee of Supply never set up, there would be no noticeable difference. . . ."

"Only when the House of Commons (so the report runs) is free, not merely in theory and under the terms of the Constitution, but in fact and in custom to vote, when the occasion requires, upon the strict merits of proposed economies uncomplicated by any wider issue, will its control over national expenditure become a reality.

"It should be established as the practice of Parliament, that members should vote freely upon motions of reductions made in pursuance of recommendations of the Estimates Committees, and that the carrying of such a motion against the Government of the day should not be taken to imply that it no longer possessed the confidence of the House." Reports from the Select Committee on National Expenditure, Nos. 95 and 121 (1918), quoted by Marriott, "Parliament and Finance," *Edinburgh Review*, January, 1920.

<sup>2</sup>"There is no more wasteful body than the House of Commons, and there is no Minister or ex-Minister who will not confirm what I say, that for one economy, good, bad or indifferent, which this House have helped to make, they have forced upon him or tried to force upon him a hundred unnecessary extravagances. It is quite idle for us to pretend that the House of Commons favours economy. We do not. We hate imposing taxes, but we love spending money." Austen Chamberlain, quoted by Marriott, "National Expenditure," *Edinburgh Review*, July, 1918.

<sup>3</sup>"Ministers must not imagine that they . . . are possessed by some divine and supreme power. . . . We want to restore to the House of Com-

opportunity; supplied, in fact, with no information at all except the printed figures, the answers of the Minister himself to any questions addressed to him, and, it may be, such facts as some member may chance to have gathered in his individual capacity and may communicate in the course of the discussion—it is plain that such an assembly, so furnished, cannot form any opinion of value on the hundreds of items formally presented each session for its consideration. The House of Commons is fully alive to the facts of the situation; and conscious of its ill-equipment, it rarely makes a serious attempt to form any opinion at all on the merits of particular estimates. Lastly, if by any rare combination of circumstances any extravagance were detected, and a motion were made to reduce an estimate and were pressed to a division, the Government of the day would need only to invoke its normal majority; the question would become one, not of the reasonableness of the estimate, but of confidence in the Administration; the lobby would be filled by members many of whom had not troubled to listen to the debate, since their vote in any case was pledged to the Government; and the motion would be defeated, with almost automatic precision, by a majority closely approximating to the known balance of party strength.

Only when all three of these fundamental defects of system are remedied will an effective Parliamentary control over finance be established.<sup>1</sup>

**Dominance  
of the Cabi-  
net**

mons not merely the right to audit the expenses that are being incurred, but to control the financial policy and expenditure of the country. . . .

"We ask for our historic rights. . . . From the most ancient times this House insisted on its right to control all the taxes and all the expenditure. It was by pursuing that traditional policy that the House in days past humbled the power of kings, and it will have to apply the very same force now to humble Ministers and to discharge this ancient fundamental duty. There is just as much danger from autocratic Ministers to-day as there was from autocratic kings in past periods of our history." *Parliamentary Debates*, Vol. XCV, pp. 1544, 1548, 1550. The whole debate (July, 1917), is of very great interest.

<sup>1</sup>The Rt. Hon. Herbert Samuel, Introduction (p. xi) to Davenport, *Parliament and the Taxpayer*.

Mr. J. A. R. Marriott, thinks that the problem of parliamentary control is linked with that of devolution. "Among the functions at present imperfectly performed [by the House of Commons] the control of public expenditure is unquestionably the most important. Where is the remedy to be sought? It is the deliberate judgment of the present writer that no ultimate solution of the difficulty will be found until it is realized that the institutions which were devised for the government of two islands in the northern seas are now groaning beneath the strain imposed upon them by the attempt to govern about one fourth of the inhabitants of the globe. The domestic concerns of the forty-six million people of the United Kingdom afford plenty of occupation for one Parliament; perhaps for more than one. The control of foreign and Imperial Affairs ought to be confided to a really Imperial Parliament. But this is an heroic remedy; it would involve organic reconstruction, and, worst of all, it would take time."

For immediate relief, Mr. Marriott suggests: (1) the presentation of accounts



In Canada there is the constitutional provision in its fundamental act of government—the British North America Act of 1867—that “it shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue or of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor General in the session in which such vote, resolution, address, or bill is proposed.” (Sec. 54).<sup>1</sup> In Canada, as in England, the party system operates to secure the almost certain and unchanged adoption by the Parliament of the budget proposals of the Ministry.<sup>2</sup>

In the Constitution of the Commonwealth of Australia, also, there is a provision similar to the one quoted from the British North America Act.

In constitutional monarchies like Prussia<sup>3</sup> and Japan, in a form comprehensible by average intelligence; (2) close scrutiny of the estimates by a Committee or series of Committees—one for each class of Votes; (3) the limitation of supplementary estimates. “The Power of the Purse,” *Nineteenth Century*, August, 1917.

<sup>1</sup>See Villard and Willoughby, *The Canadian Budgetary System*.

<sup>2</sup>Porritt, *Evolution of the Dominion of Canada*, p. 415 ff.

<sup>3</sup>“No principle of constitutional law is more solidly established, or securely rooted in the general consensus of the English nation, than that which attributes to Parliament, and particularly to the House of Commons, a right to enforce its will upon the executive by means of its control over the finances. Budget-control has always been in England a chief sanction of ministerial responsibility. Since the parliaments of the seventeenth century wrested concession after concession from the Stuart kings by withholding supplies, there has been no question as to the financial proposals affording a most potent instrument for enforcing the responsibility of ministers to Parliament, and for insuring parliamentary domination in the government. Nor has the use of this agency of control ever been viewed as unjustifiable or beyond the competence of Parliament. That an entirely different doctrine has grown up in Germany, in spite of the fact that the imperial and state constitutions expressly confer upon the legislative bodies the right to pass upon the budget, may not be surprising in view of the autocratic character of its governments; . . .

“In Germany the evolution has been different. Budget-refusal is not looked upon as a legitimate or constitutional instrumentality of parliamentary control of the administration. Strangely enough, the second form of budget-control (amendment and rejection of single items) is exercised continually without the primary form, of which it is only a development, being recognized as permissible. The relation of the German doctrine of the budget to the belated evolution of constitutional government in the Teutonic empire—to the delay in the development of a modern system of ministerial responsibility—is both that of cause and effect.” Shepard, “The German Doctrine of the Budget,” *American Political Science Review*, Vol. IV, p. 52 (February, 1910).



budgetary proposals have been given an almost overwhelming weight in the legislatures, but this has been due not to the working of party government, but to the constitutionally dominating powers of the executive. In France and Italy, the budgetary system exists, but, though accepted as a working basis, the financial proposals of the executive are freely amended—and, it may be observed, sometimes with unfortunate results.<sup>1</sup> Indeed, the testimony of experience the world over is that a popularly elected legislative chamber cannot be trusted to practice due economy in the matter of authorizing expenditures from the public purse. The wisdom, therefore, of the Standing Order of the British House of Commons which has been quoted, and of the provisions of the Australian Commonwealth and of the British North America Acts cannot be impeached.

Control in  
other coun-  
tries

The merits of the English and Canadian practice in this respect are beyond question. It would probably not be feasible to graft such an absolute constitutional requirement upon a system like that of the United States, but the fact that the spending departments of the government, supervised by the President, have not been given greater influence in the making of financial proposals to the legislature and in controlling their consideration and amendment has resulted in very great evils. The experience of all constitutional States has conclusively demonstrated the unwisdom of giving to popularly elected legislative

Merits of  
British  
practice

<sup>1</sup>For a full discussion of French budgetary procedure see Sait, *Government and Politics of France*, p. 222 ff. "The proposals of the minister of finance go before the budget committee, the most powerful of the twenty-one standing committees [of the Chamber of Deputies]. . . . the Committee labors indefatigably for several months. It explores the minutest details; it seeks to expose administrative abuses everywhere. To accomplish the task sub-committees are set up as soon as general considerations have been disposed of, and to each is assigned a single branch of the government service. There was, even as late as the close of the last century, sharp criticism of the budget committee on the very ground that it carried its activities too far, being inclined to substitute its own conclusions for those of the government." This criticism does "not apply to the practice that has prevailed in the last fifteen or twenty years, and especially since the adoption of proportional representation in the choice of committees" (pp. 225-226).

Sectional  
influences

chambers the full authority to control the initiation of revenue and appropriation acts. It is proper that they should have the right to refuse assent to financial measures presented to them by the executive, but the folly of providing that they should themselves have the free right to initiate these bills has been placed as far beyond dispute as repeated and long-continued experience can possibly place any matter. Why this is, there is not here space fully to point out. It may be said, however, that as long as human nature is what it is, it is inevitable that elected representatives should seek to secure special benefits for their several constituencies, without due regard to the general welfare of the whole country, and that they are thus led to vote for the proposals of other members in return for their approval of the special appropriations they themselves are asking for, with a result that the aggregate appropriations are extravagant in amount, and devoted, in very many cases, to wholly improper purposes when the good of the people as a whole is considered.<sup>1</sup>

Financial  
problem in  
U. S.

Until recently we in this country have been so fortunately circumstanced that it has not been imperatively necessary for us to administer our finances with economy and efficiency. It has been so easy to obtain public funds without oppressively burdening the people that we have not been compelled to determine with scrupulous care just what expenditures shall be authorized, or to guard vigilantly the spending services in the use, by them, of the amounts placed at their disposal. But this condition of affairs no longer exists. Even before the entrance of the United States into the World War, the need for better methods of financial administration had become evident not only in the National Government but in the

<sup>1</sup>For a discussion of appropriations for local purposes and pensions, see an article on "Pork," *National Municipal Review*, December, 1919. It is of interest that in the hearings before the House Committee, and in the debates on the bill, representatives insisted that a budget system was not necessary to check congressional waste. See especially the testimony of Mr. Mondell, *Hearings before the Select Committee on the Budget, House of Representatives*, p. 680 ff.

states and cities and other administrative areas. And now that the expenditure of vast amounts is demanded for the payment of war debts, measures of social improvement, and grants-in-aid to the states, this need has become an imperative one. For many years there will be large fixed charges upon our public revenues, and, as has already been said, the war caused a permanent widening of the sphere of the government, both of supervision and control of private industries and actual administration and operation which, of course, carries with it increased demands upon the public purse.

Widening  
sphere of  
Government

It would be foolish to argue that the people of the United States should adopt the parliamentary system of Great Britain. Nor is the proposal within the realm of practical politics that to the Congress should be given the power to expel the executive from office—although it may here be said parenthetically that, in fact, in Great Britain this power is possessed by the electorate rather than by the Commons, for it has been many years since a British ministry has been obliged to resign because of a failure to obtain parliamentary support for its policies. What does plainly appear, however, is that the English system is far superior to ours in so far as its representative body submits to executive direction, and in so far as it compels that executive to supply it with the information which is needed in order that it may not only pass an intelligent opinion upon the measures presented to it, but give publicity to their acts and pass judgment upon the economy, efficiency, and honesty with which the affairs of the government have been administered.<sup>1</sup>

Merits of  
Parliamentary  
System

These propositions have a direct and important bearing

<sup>1</sup>This judgment is not inconsistent with the statement already made (and to be repeated later) that the House of Commons generally accepts executive recommendations. It is true, nevertheless, that full information and the *possibility* of expelling the executive are two checks of some value. At least the English executive is restrained from doing anything as outrageous as our President might do with impunity, unless it was so very serious as to cause impeachment proceedings.



Executive  
responsi-  
bility  
essential

upon matters of financial policy, for, as must plainly appear, it is especially within this field that the fund-raising, fund-appropriating, and policy-determining body is in need of information and advice which only the executive is competent to give. Unfortunately, however, in this country the proper use of executive information and advice has been prevented through a mistaken interpretation of what is known as the principle of "separation of powers"—force being given to it in political practice which is not inherent in it as a constitutional doctrine.

As a constitutional doctrine, the theory holds that a people can be made secure in its private and public rights only if the exercise of executive, judicial, and legislative powers be vested in different organs of government, each as free as possible from legal control by the others. As a matter of political practice, however, it is of course indispensable that these three great branches of the government should operate in harmony and coöperation; and especially as regards the executive and the legislature it is important that there should be no jealousy by the one of the power and influence of the other, so long as constitutional limits are not overstepped or endangered.

Separation  
of Powers  
Theory

By a process of historical development the operation of the British Government has been brought, as we shall see in the next chapter, to a happy condition in which the executive and legislative powers, though never confused, can be exercised in almost complete harmony and resulting efficiency. In the United States this result has not been secured and there still persists a jealousy of the power and influence of the President on the part of Congress which has prevented it from encouraging or even permitting the development of executive practices which, if employed, would not only greatly increase administrative efficiency, but put the Congress itself in a position more satisfactorily to exercise its functions as an organ of legis-



lation and as a board of supervision and control of the administrative services.

If we consider the subject wholly from the standpoint of conserving to Congress its full influence and power as the policy-forming and supervising organ of government, it is clear that, in matters of finance, Congress is of right entitled to demand that the executive shall give to it the following information:

1. An accurate and intelligible statement of the condition of the public treasury.

2. An estimate of the revenues to be received by the State from existing sources of income.

3. A statement of the expenditures of the last completed or immediately preceding fiscal year; and an estimate of the expenditures that will probably be made during the current year.

4. A statement of expenditure needs for the government during the next fiscal period.

The character and contents of these exhibits deserve some more specific description. The statement as to the condition of the Treasury now submitted to Congress shows little more than the actual cash on hand, whereas, to be adequate, it should be upon an accrual basis, and, furthermore, should clearly exhibit the status of all trust and other special funds, including, of course, the funds which each appropriation creates. It is also highly desirable that the showing thus made as of the date of the ending of the last fiscal year, should be accompanied by tables showing, for comparative purposes, the corresponding totals for one or more of the immediately preceding years. The probable condition of the Treasury at the close of the current year should also be exhibited, as well as the treasury situation to be expected at the close of the coming fiscal year, in the light of the estimates of expenditures and receipts for that year. There are some accountants who hold that this treasury balance sheet should also

Safeguards  
of legisla-  
tive influ-  
ence

Accounting  
problems

show the property assets in the way of buildings, supplies on hand, etc., that capital outlay and fixed charges should be distinguished from current expenses, and that the value and amount of materials on hand at the opening and closing of the fiscal year should be indicated.

Different  
sources of  
revenue

In the statement of revenues should appear, in parallel columns, the revenues for a series of years, including those estimated for the current year and the coming year. So far as possible all distinct sources of revenue should be indicated in one table; and, in another table, the same revenues should be given according to organization units. Care should be taken to include "reimbursable" items and proceeds from the sale of material, and all miscellaneous receipts from fees, rents, charges for services rendered, etc.

The adequate presentation to Congress of expenditures is a more difficult matter than is the preparation of revenue statements. These statements are required not only that Congress may accurately estimate the needs for the coming year, but in order that it may determine the economy and efficiency with which past operations of the government have been conducted. And by deciding on this matter of administrative economy and efficiency Congress is, of course, enabled not only to fix administrative responsibility, but, incidentally, to limit appropriations for the future to sums which, while sufficient, will prevent wasteful and extravagant expenditures.

Report of  
expendi-  
tures

For the purpose, then, both of supervision of the administration and of making financial provision for the next fiscal year, it is indispensable that expenditures should be reported in five different forms: namely, according to (1) funds upon which chargeable; (2) character (capital outlay, fixed charges, and current expenses); (3) organization units; (4) activities, that is, pieces of work done or distinct services rendered; and (5) objects, that is, materials or personal services purchased. Only when expenditures are thus reported is it possible for the fund-

granting and directing authority to determine what returns have been obtained from the expenditures previously authorized; what each department, bureau, or other government establishment has actually cost for maintenance and operation; and what expense each particular piece of work done for the government has entailed. At the present time, except in a very few instances, no such classified expenditure accounts are kept, nor is there any approach to uniformity of presentation where they are kept.

The need in any system of financial administration for a revision and coördination of the original estimates of various bureaus and departments is due to two facts: the one of knowledge, and the other psychological, as characteristic of human nature itself. As regards the matter of knowledge, it is clear that the heads of the several subdivisions of the administrative service cannot be expected to have exact information as to the needs of services other than their own, or of the government as a whole. As regards the psychological or subjective element, it is but natural and, indeed, laudable that each head of a bureau should emphasize the value of the service which he directs and seek to increase its scope and importance, and, therefore, be disposed to ask for corresponding financial support. It is thus to be expected that he will ask for all that he can possibly hope to get without regard to the demands of the other services.

In the United States only the President could effectively exercise this revisionary power. The only other official to be thought of in this connection would be the Secretary of the Treasury,<sup>1</sup> but if the authority were vested in him it

Revision of  
estimates

Treasury or  
Presidential  
control

<sup>1</sup>The House of Representatives and the Senate differed as to the official by whom the budget should be prepared. It was the view of the House Committee, expressed in the bill which the House originally passed, that the bureau of the budget should be immediately responsible to the President; indeed, the bill provided that it should be in the executive office of the President. The Senate Committee took the other view, that the bureau should be under the Secretary of the Treasury; and the draft as passed by both Houses (and vetoed by President Wilson) made the Secretary of the Treasury the director. The bill as considered in the Sixty-seventh Congress created the bureau in the Treasury Department



Increase of  
President's  
authority

would inevitably become merely a matter of form, the real discretion being exercised by the President. This would necessarily result from the official relation in which the Secretary of the Treasury, and the heads of all the other great executive departments, stand towards the President, and from the fact, which has earlier been pointed out, that it is always possible for the President, through his constitutional powers of appointment to and dismissal from office, to secure members of his Cabinet who are in accord with his policies.

That the introduction of budgetary methods will result in a considerable increase in the political influence and prestige of the President cannot be doubted; and that the estimates collected and revised by competent officials and submitted by the President will have a weight which will make it less easy than it now is for Congress to depart from them, is also reasonably certain. The question before Congress and the American people thus reduced itself to this: Is there really any objection to giving to the President a greater influence than he now exerts in matters of financial legislation? Or, if there is any objection, is it of a sufficiently serious character to warrant the foregoing of the advantages which might be obtained?

But this  
objection  
not serious

To all persons who fully understand the principles of public financial administration and who also are able to view the matter without personal or political bias, there has been no hesitation in answering that the advantages certain to accrue from subjecting the departmental estimates to presidential revision should be secured. And there are few students of the science of government and of

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and provided for a director. It was reported in the debate that President Harding favored putting the responsibility on the Secretary of the Treasury. *Congressional Record*, April 26, 1921, p. 615. In England, as has been said, the fact that the Treasury is a spending department has militated against the revision of estimates downward.

The provisions of the Budget Bill as regards the submission of the estimates to Congress and the legislative audit are so interesting, that the text of the compromise measure, reported by the Conference Committee on May 25, is given in the Appendix. See below, p. 517.

the American constitutional system who see any disadvantages that would result from an increase in the President's power and influence in matters of financial administration.

It needs to be pointed out, finally, that important though it is, the employment of a budgetary procedure relates to but one phase of the general problem of public financial administration. After the estimates for expenditures and accompanying recommendations for revenue legislation are submitted to the legislature, there arise the questions: What shall be the legislative procedure with reference to supply bills and revenue measures? how may the expenditures thus authorized be efficiently and economically made? how may they best be audited and controlled? in what way may a report upon them be best made back to the legislature? and how may these reports, when thus rendered, be properly scrutinized and thus the legislature enabled to determine the fidelity and efficiency with which its commands have been executed, and the spending agencies of the government held to a legal and political responsibility for their acts.<sup>1</sup> These, however, are questions which, though of great importance, may be separated from those presented by the employment or non-employment of what is termed a Budget.

Question of  
supply

#### TOPICS FOR FURTHER INVESTIGATION

British Financial Procedure.—Willoughby, Willoughby, and Lindsay, *The System of Financial Administration of Great Britain*; Lowell, *The Government of England*.

<sup>1</sup> Congress desired to have the accounting office under its control and this led to the veto of the first measure by President Wilson. See above, p. 184. In the revised bill, the comptroller general and assistant comptroller general can be removed by joint resolution (signed by the President, or passed over his veto) after notice and hearing, for neglect of duty, malfeasance, etc. After Mr. Wilson's veto, Congressman Good presented a measure which provided for the appointment and removal of the comptroller general by the United States Supreme Court, but an amendment was adopted vesting appointment in the President, subject to senatorial confirmation. See *Congressional Record*, June 5, 1920, p. 9302.

The Origin of Political Institutions and the Control of the Purse.—Jenks, *The State and the Nation*; Pollard, *The Evolution of Parliament*; Lowell, *The Government of England*; Marriott, *English Political Institutions*.

Financial Control in France.—Sait, *Government and Politics of France* (and references); Ogg, *The Governments of Europe*.

Financial Control in Prussia and Japan.—For references, see below, Chapter XX.

The American Budget Act.—Of especial value are the publications of the Institute for Government Research at Washington, D.C. The influence exerted by the Institute in promoting budgetary reform in the United States has been a very considerable one. For the text of the Federal Budget and Accounting Act of 1921, see Appendix, IV.



## CHAPTER XVII

### RESPONSIBLE PARLIAMENTARY GOVERNMENT

IN THE system of parliamentary government as it operates in Great Britain and in her "Overseas Dominions"—the Dominion of Canada, the Australian Commonwealth, the South African Union, New Zealand, and Newfoundland—we have a type of representative government which is at once the most interesting historically, the most widely exhibited, and, with little doubt, the most successful when judged by its amenability to the public will, as well as its administrative efficiency. In any discussion of the problem of government, therefore, there must be an analysis of the essential features of the British system.

In outward form, Great Britain, is, of course, a monarchy. By a long process of constitutional development, however, the principle has become firmly established that the powers of the Crown may not be exercised by the King according to his own personal judgment, but only at the suggestion, which amounts practically to the imperative direction, of his chief advisers, termed ministers, who collectively are termed the Ministry, or, in a somewhat narrower sense, the Cabinet.<sup>1</sup> There are, to be sure, a number of important powers which the Crown may exercise without securing prior legislative approval—such as

Parliamentary Government in the British Empire

Ministry and Cabinet

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<sup>1</sup>The Ministry includes all those officials who lose office when there is a change of "government," that is, when a new political party, or coalition of parties, assumes control. The Cabinet includes only those higher officials who are recognized to have the function of determining the broad public policies which are to be pursued. But this distinction was lost sight of when Mr. Lloyd George created his War Cabinet in December, 1916.

the conclusion of treaties<sup>1</sup>—but even these must be exercised only upon the advice of the Cabinet.

Cabinet  
responsi-  
bility

For all advice which the King's ministers give to him, as well as for the policies which they propose to the Parliament for its adoption, and for the manner in which these policies are executed after adoption, the Ministry, or "Government," are legally and politically responsible. They are *legally* responsible in that they may be individually proceeded against: civilly or criminally, in the ordinary courts for any illegal acts they may have committed or authorized; or by impeachment, for any treasonable or other improper official practices upon their part. They are *politically* responsible in that, as a practical proposition, they can remain in power only so long as they are able to obtain support from the Parliament for the policies advocated by them and approval of their methods of administration. It is this unescapable political responsibility of these executive officials to the legislative body which gives the name to the form of government which the British system exemplifies.<sup>2</sup>

Slight con-  
trol of ex-  
ecutive ac-  
tion

Two important points with reference to the status and powers of the British executive need to be noticed. The first is that, to a less extent than under almost any other form of popular government, the legislative body does not attempt itself to exercise executive or administrative func-

<sup>1</sup>The House of Commons can, of course, dismiss any Ministry to whose foreign policy it objects and in actual practice has treaties submitted to it before final action is taken. The Treaty of Versailles was debated in Parliament and voted upon before ratification took place; and the proposed defensive alliance between England and France (June 28, 1919) provided (Article 4) that, before ratification by His Britannic Majesty, it should be submitted to Parliament. (*Supplement to American Journal of International Law*, October, 1919, p. 414). See S. R. Chow, *Le contrôle parlementaire de la politique étrangère en Angleterre, en France et aux États-Unis*, Chap. II (Paris, 1920).

<sup>2</sup>There are any number of excellent books dealing with parliamentary government. The leading authority is A. Lawrence Lowell, *The Government of England*; briefer accounts are S. Low, *The Governance of England* and J. A. R. Marriott, *English Political Institutions*. The chapters in F. A. Ogg, *The Governments of Europe* are very good and the foot notes are especially valuable. *The Liberal Year Book* and *The Constitutional Year Book* (published annually in London by the Liberal and Unionist parties respectively) should also be mentioned. They are mines of valuable information.

tions.<sup>1</sup> The second is that little attempt has been made to restrict the sphere of executive action. Its modes of operation have been more or less defined—though even here wide discretion is usually allowed—but the extent of executive power has not itself been diminished. As a matter of law, then, the powers of the British Crown are very great. In other words, inasmuch as the Parliament is able to enforce a political responsibility to itself and a legal responsibility in the courts of justice, for executive acts, it has been willing that the executive should remain powerful.

Except  
through  
political  
responsi-  
bility

This practice is in accordance with two of the most important principles of efficient government: the one being that the legislature should not attempt the exercise or even the detailed control of executive or administrative action, a function for the efficient performance of which its size and composition disqualify it; the other being that where strict accountability is maintained, the executive may safely be left strong. Thus, and thus only, is it possible to harmonize efficiency in government with popular control.

The British Parliament is a bicameral or two-chambered body, but the Upper Chamber, though still exercising important functions, no longer exerts any decisive influence in the determination of public policies. There is no question that the average political abilities of the members of the House of Lords, or at least of those who commonly attend its meetings, are considerably higher than those of the House of Commons, and these abilities are often beneficially used in criticism and suggested amendments of the legislation coming to it from the Lower House.<sup>2</sup> The fact, however, that it is not popularly elected but is, for the most part, composed of hereditary members, has

The House  
of Lords

<sup>1</sup>For the interference by the French Chamber in the details of administration, see Garner, "Cabinet Government in France," *American Political Science Review*, Vol. VIII, p. 353 (August, 1914), and Faguet, *The Cult of Incompetence*, Chapter II.

<sup>2</sup>As a critic of legislation proposed by the Government, the House of Lords still exerts some influence. During the session of 1920, for example, its amendments to the Agricultural Act and the Irish Home Rule Act were important and



doomed the Lords to the minor function of criticizing rather than originating and has prevented it from uttering a decisive opinion upon public policies. This subordinate position has been especially emphasized since the enactment of the Parliament Act (1911) which provides that money bills may become laws if not assented to by the Lords within one month after being sent to them, and that all other public bills<sup>1</sup> may similarly become laws if passed by the House of Commons in substantially similar form in three successive sessions, a period of at least two years intervening between the time of their introduction and final enactment.<sup>2</sup>

Its influ-  
ence

It is recognized by all British statesmen that the composition of the House of Lords is not satisfactory and must be reformed. In so far as this reform, when effected, gives to the chamber a more popularly representative character,

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advisable and were accepted by the Commons. It is worth while noting, furthermore, that the Lords have shown more solicitude than the Commons for individual rights of British subjects. The Lords were reluctant to accept the Emergency Powers Act of 1920 and disliked the Defence of the Realm Act. See Rogers, "British Liberty and Arbitrary Power," *The Weekly Review*, December 22, 1920, and above, pp. 98, 103. For a more unfavorable view, see above, p. 235 n.

<sup>1</sup>Except to confirm what are termed "provisional orders" or to extend the maximum duration of Parliament beyond five years. The provisional orders referred to are orders issued by the government departments in pursuance of a delegated legislative authority.

<sup>2</sup>The preamble to the Parliament Act (1 & 2 Geo. V; ch. 13) contained the following clauses:

"And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:

"And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords."

No official proposal has been made. The most important development was the *Report of the Conference on the Reform of the Second Chamber* (Cd. 9038, 1918) but this recommended a sort of diluted democracy and was not very favorably received. On the general subject, see E. Jenks, "The Parliament Act and the British Constitution," *Columbia Law Review*, March, 1913; J. H. Morgan, *The House of Lords and the Constitution*; J. A. R. Marriott, *Second Chambers*. See also the introduction to the eighth edition of Dicey, *Introduction to the Study of the Law of the Constitution* (1915). There was an important debate in the Lords in March, 1921, on the functions of a second chamber.



we may expect that its influence will increase.<sup>1</sup> But that it should ever be allowed to have a decisive voice in the determination of public policies is very unlikely. As will later appear, there are governments in which the Cabinet or Ministry are responsible to two houses,<sup>2</sup> but the defects of such a plan are so obvious that it is scarcely conceivable that the statesmen of Great Britain will ever substitute it for the more simple arrangement that they now have. In those countries in which there is a two-chambered control of the executive, there have been special reasons why it was not feasible to avoid it.

It is in the House of Commons, the popularly elected branch of Parliament, that the will of the British people is deemed to find authoritative expression. The truly popular character of this body dates, however, from comparatively recent years. Until 1832 the suffrage was so limited that only the landed gentry were really represented, and even the famous Reform Act of that year only partially remedied the chamber's unrepresentative character. Only since the reform acts of 1884 and 1885, which still further widened the suffrage and effected a more equitable territorial distribution of seats, can the House of Commons be said to have been a legislative body representative of the whole people.<sup>3</sup>

Representative  
character of  
Commons

<sup>1</sup>Sir Sidney Low says that "the real danger 'of a modified House of Lords' is that it might become too strong." *The Governance of England*, p. 246.

<sup>2</sup>For a suggestive argument that one chamber will become a body of secondary importance when the cabinet is responsible to the other, and that the cabinet cannot in the long run be responsible to both chambers, see Lowell, *Essays on Government*, Chap. I, and *Governments and Parties in Continental Europe*, Vol. I, p. 25.

<sup>3</sup>On extensions of the suffrage, see J. H. Rose, *The Rise and Growth of Democracy in Great Britain* (Chicago, 1898); J. H. Park, *The English Reform Bill of 1867* (Columbia University Studies, 1920); and H. L. Morris, *Parliamentary Franchise Reform in England from 1885 to 1918* (Columbia University Studies, 1921). On the recent extensions, see J. A. R. Marriott, "The New Electorate and the Legislature" *Fortnightly Review*, April, 1918; "Politics and Politicians," *ibid.*, October, 1918. There is a note on "The British Representation of the People Act" in *American Political Science Review*, August, 1918, and the changes are given in detail in *The Annual Register for 1918*, p. 51. For an analysis from the lawyer's point of view, see *Journal of the Society of Comparative Legislation*, July, 1919, pp. 3-11.

**The  
Cabinet**

The Cabinet is the collective name given to those ministers who are at once the advisers to the Crown, the leaders of the dominant party in the House of Commons, and the heads of the leading executive departments of the government. The composition of the Cabinet is not definitely fixed either by law or custom. However, it always includes certain high officials among its members, and such other officials as have to deal with matters which it is known or expected will be the subject of legislative action. The directing head of the Cabinet, and therefore of the administration, bears the title Prime Minister, or, using the French term, as is often done, the Premier.

**Responsible  
to Parlia-  
ment**

An existing cabinet having failed to retain the support of a majority in the House of Commons, its members resign the executive offices held by them, and *ipso facto* cease to be advisers to the King. The King, thereupon sends for the member of Parliament, who may be in either the Commons or the House of Lords, who appears to be most clearly recognized by the majority in the Commons to be their leader.<sup>1</sup> Usually there is not much doubt as to who this is, but occasionally the King is able to exercise some choice as to this, although even as to this he is in practice influenced by the judgment of the retiring premier.<sup>2</sup> The one thus selected is asked to head the new Ministry and to designate whom he wishes to be appointed to the various high offices that have been vacated, and which of these he wishes to be taken into the still narrower

<sup>1</sup>For the circumstances of Mr. Asquith's resignation (December, 1916) and the appointment of Mr. Lloyd George, see H. Spender, *The Prime Minister*.

<sup>2</sup>When, following the defeat of the Conservative Party in the General Election of 1880, Lord Beaconsfield resigned, "the Queen had apparently a wider liberty of choice" than at any other time during her reign "except perhaps in 1859 and subsequently in 1894." Lord Granville, Lord Hartington, and Gladstone were possible. "The selection of a Statesman to be entrusted with the formation of a Government is one of the very few public acts which the Sovereign can constitutionally perform without his responsibility being covered by Ministerial advice. It lies entirely with his discretion whether he shall or shall not consult the outgoing minister." Monypenny and Buckle, *Life of Benjamin Disraeli*, Vol. VI, p. 533. See also Morley, *Life of Gladstone*, Book VII, Chap. 9. Mr. Buckle's account of the manner in which Queen Victoria selected her Premiers (during Disraeli's leadership of the Conservative Party) is especially valuable.

circle of his Cabinet. His choice in this respect is also much limited since party considerations, former services, the general wishes of the members of the majority party in the Commons, all have to be considered. Thus, though the appointment of the Prime Minister is in the hands of the King, and the appointment of the other ministers in the hands of the Prime Minister, the real choice is largely made by the House of Commons itself. It is upon its floors that, for the most part, the persons to be selected have made their political reputations, and it is the knowledge that they have the confidence and support of their party colleagues in that body, which, in most cases, makes practically imperative their appointment.

The Prime  
Minister

With reference to the political and constitutional status of the Prime Minister it is to be observed that, under the British system, the term Premier or Prime Minister denotes a political title rather than a distinct office.<sup>1</sup> Legally and constitutionally he is upon a level with the other members of the Cabinet. Like them, he is a member of Parliament and holds one of the great portfolios of State. He is entrusted by the Crown with the important task of

His legal  
position

<sup>1</sup>"The Prime Minister has no salary as Prime Minister. He has no statutory duties as Prime Minister, his name occurs in no Acts of Parliament, and though holding the most important place in the Constitutional hierarchy, he has no place which is recognized by the laws of his country. That is a strange paradox." Mr. A. J. Balfour at Haddington (1904), quoted by Low, *The Governance of England*, p. 153. Social precedence has been taken care of through the assignment to the Prime Minister of a position between the Archbishop of York and the premier Duke. The Prime Minister is usually the First Lord of the Treasury and draws his salary from this office; but Mr. Gladstone was on two occasions Chancellor of the Exchequer; Lord Salisbury was Secretary of State for Foreign Affairs, and Lord Rosebery was Lord President of the Council. Mr. Asquith became his own Secretary of State for War after the Curragh incident and the resignation of Sir John Seeley (1914). The title Prime Minister now appears in reports of meetings of the Privy Council and in other documents. For example the Treaty of Versailles was signed, on behalf of King George, by "The Right Honourable David Lloyd George, M. P., First Lord of His Treasury and Prime Minister" (cf. "The Honourable Woodrow Wilson, President of the United States acting in his own name and by his own proper authority.") The first use of the title Prime Minister in a treaty was when Disraeli signed the Treaty of Berlin (1878). See Low, *The Governance of England*, p. 156.

A report of a select committee on the "Remuneration of Ministers" (December, 1920, H. C. 241) recommends that the Prime Minister receive a salary as head of the Government and suggests other improvements of the present anomalous features—both as to positions and stipends—of the British Ministry.



*Primus  
inter pares*

Collective  
responsibility

recommending the other persons who are to receive the high executive appointments and to be associated with him in a cabinet for the formulation of the public policies which are to be proposed to Parliament. He thus is the chief spokesman of his party and undoubtedly has, ordinarily, a greater personal influence than any other minister. But he has no legal authority; he is simply *primus inter pares*. In theory, he and his cabinet associates should come to a concerted agreement upon the policies of the Government, but, when these policies are approved by the Parliament, no attempt is made by the Premier or by any other cabinet minister to interfere with or dictate the manner in which departments other than his own shall be administered. Undoubtedly there may be mutual discussions and friendly advice given and followed, but nothing more than this. In general, however, according to constitutional theory, the Cabinet, as a whole, is held responsible for the honest and efficient conduct of public affairs in all the branches of the Government. The instances in which, in England, the Ministry in power has not been held jointly responsible for misconduct or administrative inefficiency of one of its members were, until the outbreak of the war, few in number. This joint responsibility has, indeed, been one of the sources of the great influence of the English Cabinet; and if a member finds himself in substantial disagreement with his colleagues upon matters of public policy, and is unable to bring them to his point of view, the custom is for him to resign his executive post and cease to be a member of the Cabinet.<sup>1</sup>

<sup>1</sup> It should be said that the Cabinet is not a body known to the law; that is to say, it has no organization fixed by the law. Regular cabinet meetings are held in order that policies may be agreed upon, but until Mr. Lloyd George's War Cabinet, no minutes of these meetings were kept, and there were no secretaries or other clerks attached to the Cabinet. A further characteristic feature of the English system is that for each great executive department there exists a permanent under-secretary whose position is not dependent upon party allegiance, and who has the actual administrative control of the department subject only to the general policies of his political chief who is a member of the Ministry. Excellent descriptions of cabinet government are in Morley's *Life of Walpole* and *Life of Gladstone*.



The successful operation of the English parliamentary system has been very largely dependent upon the existence of two well-organized and fairly well-balanced political parties; for this has meant that there is in Parliament an opposing and powerful party which keeps constant watch on the doings of the party in power and is ever ready to criticize it, expose its errors, and, generally, to hold it publicly accountable for all its acts. It has frequently been said that this opposing party, which is known as "His Majesty's Opposition," is as necessary a feature of the English system of government as is the Ministry which for the time being, is in power.<sup>1</sup> The existence of this opposition means also, that, upon the defeat of the Ministry there is ready at hand a coherent and organized political party into whose hands the reins of government may be entrusted; this factor has made the Government of England, if not more efficient, at least more stable and more easily operated than that of France, to say nothing of the difficulty which a cabinet type of government experiences when any considerable policy-determining powers are exercised by an upper legislative body.

Finally, it may be said, that the English system has worked successfully only because a considerable number of understandings and "gentlemen's agreements" are recog-

<sup>1</sup> The parliamentary "system requires for its working two sets of protagonists. One does the administrative and legislative work of the country and defends what is done. The other is anxious to do the administrative and legislative work of the country, and, in the mean time, condemns what is done. To the one side all is light, all is white; to the other, all is shade, all is black: there is no twilight, and no gray.

"The outcome of this sometimes illogical but continuous conflict is the government and guidance of the British Empire. In the same way, justice, pure justice, is the result of the contest between two sets of advocates on two different sides. The only difference is that the politicians professedly speak from conviction, while the lawyers professedly speak from their briefs.

"In effect, however, the result is much the same. The advocates of the Government happen to find everything done by the Government right, and the advocates of the Opposition happen to find everything done by the Government wrong. It is a strange and perpetual but not fortuitous coincidence." Lord Rosebery, *Lord Randolph Churchill*, p. 181.

nized and lived up to by those in authority.<sup>1</sup> It may, indeed, be said, that for the successful operation of any form of government, good faith, a disposition towards fair play to one's political opponents, a general willingness to compose differences of opinion, and a self-sacrificing zeal for the public good—in short, constitutional morality—are necessary.<sup>2</sup> But this sentiment is, perhaps, especially required in England, operating as she does without a formulated written constitution.

Dominance  
of the  
Cabinet

Although, as has been said, the Ministers practically owe their election to the House of Commons, and are dependent upon its will for continuance in office, the British Cabinet none the less has come to lead rather than to follow the House; to rule it rather than to obey it. Whatever may be the theory, the fact is that this group of officials determine what legislative proposals shall receive consideration in the Parliament, when and for how long they shall be debated, and when the final votes upon them shall be taken.<sup>3</sup> In very large measure they also decide what, if

<sup>1</sup>As to these gentlemen's agreements, Dicey says that the conventions of the Constitution are obeyed because, while not legally binding in themselves, their disobedience would lead the Government into illegal acts. For an example, he cites annual parliaments. These are not necessary by law, but an attempt to run the army or collect taxes would subject the ministers concerned to legal action. They must call Parliament each year to get its sanction for these annual acts. This argument is criticised by President Lowell (*The Government of England*, Vol. I, p. 12) and it is certainly true that the English aristocracy, so long in control of politics (see Belloc, *The House of Commons and Monarchy*) had a sportsmanlike attitude to the "game," and that customs and understandings, as such, have played a large part—a larger part than elsewhere—in the government of the country. It seems true, also, that political rivals in England have not been forced to extremes by public opinion as much as elsewhere, but that there has been a general agreement to play the game honorably. See *The Law of the Constitution* (8th ed.), Chap. XV. With these considerations in mind, it is interesting to examine the fiction of an "electoral college" to choose the American President and the Hayes-Tilden contest of 1876. See also Bryce *The American Commonwealth*, Vol. I, Chaps. XXXIV and XXXV.

<sup>2</sup>The phrase is that of Grote, who, describing Athenian Democracy in the time of Kleisthenes, emphasized the necessity for "A perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be no less sacred in the eyes of his opponents than in his own." *History of Greece*, Vol. II, p. 86. See above, p. 58.

<sup>3</sup>It is worth while stressing the fact that this decline of cabinet responsibility is of great importance when it is considered that the checks and balances of the British Constitution no longer exist. The Royal Veto has fallen into desuetude

any, amendments to their recommendations shall receive discussion. As has already been pointed out, according to a custom now more than two hundred years old, no measure providing for the imposition of an additional financial burden upon the people may be even proposed except with the approval of the Cabinet; and, similarly, no motion may be made by a private member, that is, one outside the Cabinet, providing for an expenditure of public moneys, and, as regards the appropriations proposed by the Cabinet, no amendment is in order save to reduce the amounts recommended.

The reason why the English Cabinet has been able to obtain this great influence and control over its own creator, the House of Commons, is that it can act as a unit and has the power to dissolve the House and order a new election if any of the proposals to which it attaches importance are not approved. In former times it was usual for a defeated ministry to resign and thus give opportunity for the formation of a new ministry drawn from the "Opposition." For a good many years, however, the uniform practice has been for a defeated ministry to advise the King to dissolve the House—an advice which he is practically compelled to follow. The result has been that the influence of the ministers over the members of the House of Commons has been greatly increased, because they know that if they defeat the Ministry the immediate result will be that they will lose their seats in the House and be subjected to the expense and worry and the very

Sources of  
its power

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(see "Auditor Tantum," "The Veto of the Crown," *Fortnightly Review*, September, 1913), and the powers of the House of Lords had been seriously diminished by custom, even before the passage of the Parliament Act. In the United States the House of Representatives, the Senate, and the President check each other, and the judiciary has a veto over all their acts. In England the courts cannot nullify reckless legislation and the people have but a single protection against the Government: the existence of a powerful Opposition in the House of Commons, representing thousands of voters in the constituencies and ready to take office. After all, it may be argued that such Opposition is as much of a safeguard as the complicated checks of the American system, but this alternative government is well nigh indispensable, and, since May, 1915, it has not been present in the House of Commons.



doubtful result of a new election. This, of course, does not mean that the government in power is able to obtain the support of those who are in radical party opposition to it; but it does mean that, under all ordinary circumstances, it is able to count confidently upon the support of the members of its own political party. Recent increases in placemen, furthermore, give cabinets quite an appreciable, financially interested, following in the House.

Presence of  
members  
in Parlia-  
ment

It should also be mentioned that the influence of the British Cabinet is still further enhanced by the fact that its members are also members of Parliament and devote most of their time to their parliamentary duties. They are in constant attendance at the sittings of Parliament and are always the leaders in the debates and in the work of the committees. This is made possible to them by the fact that permanent officials exist for the direction of the work of the great executive departments of which the cabinet ministers are the titular heads.

Centralizing  
influence of  
Treasury

Still further, it should be pointed out that the Cabinet not only presents a united front before Parliament (whatever may be the personal differences expressed at the secret cabinet meetings or in the press) but, as the executive branch of government, its members are bound together as a single administrative whole. The chief agency through which this integration is effected is the "Treasury," which is not, in itself, an administrative or "spending" department (except to a slight extent), but acts rather as an organ for coördinating and controlling the acts, expenditures, and organization of the other great departments through which the executive work of the Government is carried on. This centralizing and unifying influence of the English Treasury is one that is worth the study of all the other governments of the world, but it cannot be further described in this place.<sup>1</sup>

<sup>1</sup>See Willoughby, Willoughby, and Lindsay, *The Financial Administration of Great Britain*, and above, p. 284 ff.



In result then, not only does the Cabinet determine what public policies shall be brought before the House of Commons for its consideration, but, as a practical proposition, little likelihood exists that they will be rejected or even amended without the approval of the Cabinet. Speaking upon this point, President Lowell, in his authoritative treatise, *The Government of England*, declared:

Control of  
the House  
of Commons

To say that at present the Cabinet legislates with the advice and consent of Parliament would hardly be an exaggeration; it is only the right of private members to bring in a few motions and bills of their own or to propose amendments to them freely that prevents legislation from being the work of a mere automatic majority. It does not follow that the action of the Cabinet is arbitrary; that it springs from personal judgment divorced from all dependence upon popular or parliamentary opinion. The Cabinet has its fingers always upon the pulse of the House of Commons and especially of its own majority there; and it is ever on watch for expressions of public opinion outside. Its function is, in large part, to sum up and formulate the desires of its supporters, but the majority must accept its conclusions and in carrying them out becomes well-nigh automatic.

And, a little later on, speaking of administrative as well as legislative policies, Lowell says:

Legislation  
and Admin-  
istration

In both the English system seems to be approximating more and more to a condition where the Cabinet initiates everything, frames its own policy, submits that policy to a searching criticism in the House and adopts such suggestions as it deems best; but where the House, after all this has been done, must accept the acts and proposals of the Government as they stand or pass a vote of censure and take its chances of a change of Ministry or a dissolution.<sup>1</sup>

<sup>1</sup>Vol. I, pp. 326-327.

"The principal change," says Todd, "effected by the development of the English Constitution since the Revolution of 1688 has been the virtual transference of the centre and force of the State from the Crown to the House of Commons." One might add that the principal change effected since 1832 has been the further tendency to shift this 'centre and force' from Parliament to the Cabinet, and to render the latter amenable to the control of the constituent bodies themselves rather than to that of their elected representatives."

"Lord Rosebery, a Prime Minister who has held his office under the new conditions, has pointed out that, in any case, the theoretical accountability of the Cabinet is normally and regularly in abeyance for half the year. 'During the whole of the parliamentary recess, we have not the faintest idea of what

President Lowell, however, concludes the chapter from which this last quotation is taken with the important observation that:

If the parliamentary system has made the cabinet of the day autocratic, it is an autocracy exerted with the utmost publicity, under a constant fire of criticism; and umpired by a force of public opinion, the risk of a vote of want of confidence, and the prospects of the next election.

Control of  
the Cabinet

This statement suggests the last inquiry which needs to be made in discussing the location, in actual fact, of the policy-making function under the British system; namely, as to the influences which are brought to bear upon members of the Cabinet which they cannot disregard, and which, therefore, limit the free exercise of their own individual judgments. If we find such influences existing, then, to the extent that they are controlling, the final source of public policy is in the agencies that exert them.

As regards the House of Commons we have found the Cabinet's judgment and will practically controlling, for it is indubitable that the House of Commons is no longer the arbiter of the fate of ministries. That function has been taken over by the electorate, if, indeed, it can be said that the electorate exercises an appreciable influence on the Cabinet. Certainly, however, the House of Commons does not. From 1867 to 1906 nine changes of government took place, and in seven of these the ministers went out because of an adverse verdict of the electors, and not from a vote of the Commons.<sup>1</sup> That pressure is exerted by the electorate, party

By the  
Electorate

our rulers are doing, or planning, or negotiating, except so far as light is afforded by the independent investigations of the press." Low, *The Governance of England*, pp. 54, 82.

<sup>1</sup>"One of the most important historic powers of the House of Commons, is the power of driving a Ministry or Government from Office. That power was not only possessed by the early Parliaments of the nineteenth century, but was continually exercised; and Administrations, strong in reputation and in parliamentary support, were repeatedly overthrown by revolts of their own followers, and dismissed by the vote of the Commons. So Wellington was overthrown in 1830, and Grey in 1834. So Peel was driven from power by the Protectionist revolt in 1845. So Lord John Russell fell in 1852, and so in a few months after-

organizations, and the press is certain, but that it is often controlling, may be doubted. A remarkably adverse series of by-elections in 1919 and 1920 (by 1921 the Labour Party had gained twelve seats) did not shake Mr. Lloyd George's Ministry. As regards the origination and formulation of public policies the English Cabinet exercises as free a judgment as is probably possessed by any other organ of government in the world. Even the political party organizations concern themselves very little with these matters, their activities being largely confined to the making of nominations, registering voters, and conducting the campaigns when members are to be elected to the House. The candidates accept the general policies of their party as formulated by its leaders in the Cabinet, and the party organizations content themselves with disseminating and arguing the wisdom of these policies. The situation in England in this respect is thus very different from that found in the United States where the policies of the great political parties are decided upon outside of the legislative halls, and given more or less definite formulation in the so-called party "platforms."<sup>1</sup>

Influence  
of Party  
Organiza-  
tions

wards fell the Ministry of Derby and Disraeli. So the Coalition Ministry of Lord Aberdeen was defeated in 1855 by a vote of censure on the conduct of the Crimean War. So in 1857 Palmerston was beaten on the Chinese War, and again in 1859 on the Conspiracy Bill; so in 1865 the strong Ministry of Russell and Gladstone was overthrown on its Reform Bill by the rebellion of the Adullamites.

"If we take the year 1870 as the pivot year, we shall find that in the forty years that preceded 1870, nine administrations which could normally command a majority of the Commons were upset by the independent action of members of that House. In the forty years that have passed since 1870 only one instance of this happening can be mentioned—the defeat of Mr. Gladstone's Home Rule Bill of 1886. There the circumstances were in many ways exceptional, and even that example is now nearly a quarter of a century old. In the last twenty-four years not a single case of such independent action on the part of the Commons has occurred." Hilaire Belloc and Cecil Chesterton, *The Party System*, pp. 30-31.

<sup>1</sup>"The partial supersession of the platform by the Press; the increasing recourse to the 'interview' and the 'communiqué' on the part of Ministers whose immediate constitutional responsibility has been to Parliament; the curtailment of the reports of parliamentary debates; the development of direct communications between Ministers and powerful but sectional organizations—these things may be regarded as straws, but I submit that they indicate the direction in which the constitutional stream is flowing. Should these tendencies become more



Public  
Opinion

And yet there can be no doubt that the general will of the English people, as it finds expression in the press, in the resolutions of public meetings, and in the declarations of various associations, has an influence upon the Cabinet, and, at times, one that is practically controlling. At the time that Great Britain entered the present war, the popular demand that Kitchener should be given charge of the War Office was one that neither the Cabinet nor the Commons could disregard, and Lloyd George has always derived much of his power from the place which he is known to have in the confidence and trust of the people. Especially since the outbreak of the war, the influence formerly exerted by the House of Commons upon the Cabinet as a body has greatly declined and been replaced by the will of the people at large. Whether this marks a permanent shifting of influence remains to be seen.

Essential  
theories of  
Cabinet  
Government

Cabinet government, to describe it somewhat differently, has meant that the control of administration is vested (1) in a ministry which is (2) a committee of Parliament, (3) chosen from members of the dominant political party, (4) meeting in secret and, (5) owing a collective responsibility to the House of Commons, and holding office only so long as it can maintain the confidence of the legislature and force it to do its bidding.<sup>1</sup> This statement may be subject to some qualification, but its five elements are sufficiently accurate to indicate the revolutionary character of the War Cabinet which England had from

pronounced, Parliament might be reduced to the functions with which it was satisfied until the close of the sixteenth century; it would still make the laws and vote the taxes, but it would cease to exercise direct control over the Executive. Ministers would take their instructions from the primary electors, not from the elected representatives." Marriott, "Politics and Politicians," *Fortnightly Review*, December, 1918. It is interesting to compare this tendency with the proposals of the Webbs for a political and an economic parliament (*A Constitution for the Socialist Commonwealth of Great Britain*).

<sup>1</sup> See Sidney Low, "The Cabinet Revolution," *Fortnightly Review*, February, 1917. On the historical connection between the evolution of a "responsible" executive and the development of party government, see an interesting article by J. A. R. Marriott, "Politics and Politicians," *Fortnightly Review*, December, 1918.

December, 1916, to October, 1919. Ten months after the war began, Mr. Asquith reorganized his Ministry and took in a number of Unionists. This coalition—the negation of the government by party which is, in theory, a necessary feature of a parliamentary system—held office until December, 1916; politics was in truth adjourned, and there was in the House of Commons no opposition ready at all times to criticise, and perhaps to defeat, the Government and take its place. Such a coalition was not a novel experiment; there had been several previous ones, and while Disraeli was correct when he told the House of Commons in 1852 that “England does not love coalitions,” certain critical periods seem to have demanded them. The fact may be a merit or a defect of the cabinet system.

Government  
by a  
Coalition

In December, 1916, Mr. Asquith resigned for reasons which are still obscure and which it is not necessary to attempt to discuss here. His successor was Mr. Lloyd George, who formed a government on entirely new lines. First of all, he separated the Cabinet from the Ministry. To be sure, he added to the twenty-three amateurs who had tried to function with collective responsibility as Mr. Asquith’s Cabinet, but this was not the Cabinet at all; the ministers were simply department heads and the Government consisted of a Committee of Five. Two of these were “ministers without portfolio,” that is, not answerable to the House of Commons for their conduct of executive departments; one was Lord President of the Council and in this office had little to do; and the Prime Minister himself held the merely titular office of First Lord of the Treasury. Mr. Bonar Law was at the same time a member of the War Cabinet, Chancellor of the Exchequer, and, in place of the Prime Minister, Leader of the House of Commons. This super-cabinet marked a negation of all the five theories mentioned above: it was obviously contrary to the principles of cabinet government.

Mr. Lloyd  
George’s  
changes

Party lines were absolutely obliterated; the Unionists

The War  
Cabinet

controlled the Cabinet, under (supposedly) a Liberal Premier, even though the Liberals were in a majority in Parliament. The Ministry as a whole could not be held collectively responsible if the War Cabinet was to coördinate and direct the work of the heads of administrative departments, and from the Cabinet were deliberately excluded some of the most important officers of the Crown. The Directory, for example, included neither the Secretary of State for War nor the Secretary of State for Foreign Affairs. It was selected apparently for the administrative ability and not on account of the parliamentary reputation of its members, and, as has been said, it included men who were relieved of departmental burdens. There are very light administrative duties attached to the offices of Lord Privy Seal, President of the Council, and Chancellor of the Duchy of Lancaster, but Lord John Russell was one of the few English ministers, if, in fact he was not the only one, who ever served "without portfolio."<sup>1</sup> Secrecy, an essential element of the old cabinet system, was abandoned; a secretariat was appointed and reports of the War Cabinet have been issued for 1917 and 1918. They survey all the problems of the war, and, while inclined to gloss over failures and to overestimate successes, are two government documents which are not dry reading. They give an exceedingly valuable record of recent British history.<sup>2</sup>

Decline of  
Parliamentary  
Authority

These changes accelerated the decline of parliamentary authority, and the impotence of the House of Commons was both illustrated and accentuated by the action of the Prime Minister in entrusting its leadership to one of his

<sup>1</sup>The changes introduced by Mr. Lloyd George received a full discussion in the periodicals. The following articles will be found of value: A. V. Dicey, "The New English War Cabinet as a Constitutional Experiment," *Harvard Law Review*, June, 1917; R. L. Schuyler, "The British War Cabinet," *Political Science Quarterly*, September, 1918, and "The British War Cabinet, 1916-1919," *ibid.*, March, 1920. See also J. A. Fairlie, *British War Administration*.

<sup>2</sup>*Report of the War Cabinet for 1917* (Cd. 9005, 1918) and *Report of the War Cabinet for 1918* (Cd. 325, 1919).



colleagues. For a Prime Minister, a member of the House of Commons, not to be on the Treasury Bench to defend himself was unknown to British parliamentary practice. It was an evidence that he did not think himself dependent upon the confidence of the legislature for his continuance in office, and, in fact, Mr. Lloyd George did not owe his Premiership to the decision of the House of Commons. His selection was due to inchoate but unmistakable public opinion; he may, or may not have been indispensable, but there was no alternative to him, and while in theory the War Cabinet he headed still had to retain the confidence of the House of Commons, in actual fact the legislature was coerced into acquiescence. Elections were not desired during the war—Parliament prolonged its life—and Mr. Lloyd George was Prime Minister so long as he did not dissolve. Personal responsibility was occasionally enforced;<sup>1</sup> but the War Cabinet dominated the Commons. At the elections in December, 1918, Mr. Lloyd George appealed to the people on his war record and the necessity of a hard peace. He scored a great personal triumph; candidates "couponed" by him—that is, given official approval—controlled the Commons by a large majority, although most of them were Conservatives acting under the leadership of a Liberal. The War Cabinet was continued until, as a consequence of increasing criticism—and partly because of a defeat in the House of Commons<sup>2</sup>—Mr. Lloyd George decided to abandon his War Directory and go back, in theory at least, to the old prin-

Leadership  
of the  
Commons

Abandon-  
ment of  
War Cab-  
inet

<sup>1</sup>A number of changes in the British Cabinet during the war were due to the failures of particular Ministers to keep the confidence of the House, or more accurately, perhaps, that of the press and the electorate. See the lists in Fairlie, *British War Administration*.

<sup>2</sup>Mr. Lloyd George did not think it necessary to resign in October, 1919, when he was defeated in the Commons, by a vote of 185 to 113. It was in a thin House, not on a question of great importance (the Aliens Restriction Bill), and certainly a Cabinet would not go out on such an issue so soon after a clear and unmistakable mandate from the people—even though the mind of the people may have slightly changed. Mr. Lloyd George had been defeated before, and on a more important issue. Before the General Election in December, 1918, a manifesto was issued in which Mr. Lloyd George and Mr. Bonar Law declared

ciple of collective responsibility. In theory the Premier's gesture enabled the House of Commons once more to be the government-making organ. But for the reasons which have been given, the authority of Parliament has waned. It is a very striking phenomenon that both in England and in the United States, the legislature has lost influence and the executive has become more powerful. In France this is not true, partly, the opinion may be ventured, because of the organization of the Chamber to control the executive. The diagnosis and a possible remedy for the House of Commons have been put by Lord Robert Cecil as follows:

**Proposals  
of Change**

The absurd doctrine that the fate of the Ministry is involved in almost every division should be put on one side. It is a comparatively modern growth, and has done more than anything to injure parliamentary self-respect. Members, knowing that they have got to support the Government, right or wrong, unless they are prepared to turn them out, do not trouble to listen to the debates, and the whole realities of parliamentary discussion are destroyed. The Government should announce that for the future, except on rare occasions, they will not regard a parliamentary defeat as fatal to their existence. If they refuse to do so the remedy is in the hands of members themselves. Let them vote on all matters of secondary importance on the merits of the question, and leave the Government to resign if they like. They certainly will not do so.<sup>1</sup>

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that it would be "the duty of the new Government to remove all existing inequalities of the law as between men and women." Nevertheless, the Government opposed the Labour Party's bill which abolished the age limit of 30 and allowed women to vote at 21 years of age, thus extending the franchise to 5,000,000 additional women and giving them a majority of the electorate of the country. The plea of the Government in July, 1919, was that such an extension of the franchise would involve, according to precedent, an almost immediate general election; that this was inadvisable since the Government had a full programme of legislation which it desired to pass as quickly as possible, and that the matter could be better dealt with as a government measure. Nevertheless, the bill was read a third time and sent to the House of Lords by a vote of 100 to 85. This was not a snap division since the Government had sent out a heavily underlined "whip" requesting attendance of their supporters "as the Government will oppose the Woman's Emancipation Bill on the ground that it alters the franchise." Later the measure was thrown out by the House of Lords and has subsequently been reintroduced and passed as a government measure.

<sup>1</sup>*The New Outlook*, p. 33. For the French arrangement, see above, p. 250 ff.

The British system of responsible cabinet government has been widely copied by other States, but in no other country has it operated so successfully as it has in Great Britain. The scope of this volume will not permit any detailed discussion of these variations, but certain general considerations may be advanced and mention should also be made of the French system, both from the standpoint of cabinet responsibility and legislative organization in committees to control the executive.

The British parliamentary system has been adopted by all of Great Britain's self-governing Dominions.<sup>1</sup> In all of them, however, its operation has been somewhat hindered by the existence of upper chambers which have not been willing to occupy as subordinate a legislative position as that of the English House of Lords. In the Australian Commonwealth and the South African Union the deliberate attempt has been made to conserve considerable power to their upper chambers. This has necessitated the adoption of elaborate constitutional provisions for overcoming "deadlocks" between the two Houses—provisions which in the last resort have given the greater control to the larger and more popularly selected lower houses. Of responsible parliamentary government as it operates in Italy and Belgium it will not be necessary to speak,<sup>2</sup> but of the French system something needs to be said, since it exhibits certain characteristics which make it, in itself, almost a distinct type.<sup>3</sup>

First and foremost it may be pointed out that the French legislative chambers have not been willing to grant to their political leaders who constitute the Ministry that amount of authority and directing control which is characteristic of the English system. Nor is the French Cabinet itself knit together into a unitary body, with a single,

Cabinet  
Government  
in British  
Empire

The French  
system

<sup>1</sup>See A. B. Keith, *Responsible Government in the British Dominions*.

<sup>2</sup>See Ogg, *The Governments of Europe*.

<sup>3</sup>The best discussion is Sait, *Government and Politics of France*.



harmonious political policy, such as is the English Cabinet. Thus in very many cases a French cabinet is made up of members from a number of political parties, and a new cabinet may and, indeed usually does, contain members of the Cabinet which it replaces in power.<sup>1</sup> The French Chambers have always been split up into a considerable number of political parties, no one of which is ordinarily able to command a majority of the total membership,<sup>2</sup> but to what extent this is the cause, and to what extent the result, of the representation of more than one political party in the French Cabinet it is difficult to say. The frequent cabinet changes that have taken place in France have been due to the features we have been describing.

**Power of  
dissolution**

The French Cabinet has not been able to obtain that control of the time and business of the legislative chambers which its English prototype possesses. The President with the approval of the Senate may dissolve the Chamber of Deputies, but the power has been exercised but once, and then without satisfactory results, and the tradition is now fairly well fixed that, except in very extraordinary circumstances, the right should not be exercised.

Thus it is that the French Cabinet is without that power of dissolution from which the English Cabinet derives so much power, and which, indeed, would seem

<sup>1</sup>"As a matter of fact, there have been only seven cabinets since 1875 which did not contain some members of the preceding ministry. In seventeen cabinets the premier was found in the outgoing cabinet. In a number of instances, more than half the members of the new cabinet were taken over from the old. In three of them (those of Fallières, Goblet, and Ribot), eight of the ten members held portfolios in the outgoing ministry; there have been six ministries, each of which contained half a dozen members of the old cabinet; three which contained seven; seven which contained five, and so on." Garner, "Cabinet Government in France," *American Political Science Review*, Vol. VIII, p. 353 (August, 1914). See also Shotwell, "The Political Capacity of the French," *Political Science Quarterly*, Vol. XXIV, p. 119.

<sup>2</sup>It has been asserted that the "chronic inability of the French to produce the two-party system is in itself a sure sign of their incapacity for parliamentary government." Bodley, *France*, vol. II, p. 176. "The truth of this rather severe judgment may be doubted," remarks Professor Garner, "but there is no difference of opinion among the French writers that the group system as it exists in France is a serious obstacle to the smooth functioning of the parliamentary machine." "Cabinet Government in France," *American Political Science Review*, Vol. VIII, p. 363.

to be essential to the development of a system of the English type. Provision should therefore be made for its exercise if it is desired that the English parliamentary form of government should be approximated.<sup>1</sup>

Under the French system, as it has worked out in practice the financial proposals of the Ministry are subject to amendment upon the floors of the legislature, either to increase or to decrease the amounts recommended. There can be no doubt that the recognition of this right has operated not only to weaken greatly the cabinet system, but also to bring about a vast amount of extravagant and unwise expenditure of the public money.<sup>2</sup>

In general it may be said of the French parliamentary system that it is far inferior in its results to the English system. It may, indeed, be said that such success as Republican Government has attained in France has been due not so much to the merits of its parliamentary practice as to the efficient and centralized administrative service which it happily possesses.

Weak position of Ministers

#### TOPICS FOR FURTHER INVESTIGATION

Cabinet Responsibility during the War.—“Unpublished Correspondence of Mr. Asquith and Mr. Lloyd George,” *Atlantic Monthly*, February, 1919; Fairlie, *British War Administration*.

The Theories of the War Cabinet.—For references, see above, p. 316.

Cabinet Responsibility in the British Dominions.—Keith, *Responsible Government in the British Dominions; An Analysis of the System of Government throughout the British Empire* (Macmillan, 1912); Hall, *The British Commonwealth of Nations*; Bryce, *Modern Democracies*.

<sup>1</sup>It should not be overlooked that the absence of the power of dissolution prevents not only an appeal to the electorate by a Cabinet defeated in the Chamber, but also an appeal to the electorate from an adverse vote in the Upper House. Sait, *Government and Politics of France*, p. 85.

<sup>2</sup>But see the limitation of Article 102 of the rules of the Chamber of Deputies, Sait, *op. cit.*, p. 229.

## 322 PROBLEM OF GOVERNMENT

The Functions of the British Treasury.—Lowell, *The Government of England*; Willoughby, Willoughby, and Lindsay, *The System of Financial Administration of Great Britain*.

The Reform of Parliament.—Harrison, "Novissimum Verbum," *Fortnightly Review*, December, 1920; Cecil, *The New Outlook*; Webb, *A Constitution for the Socialist Commonwealth of Great Britain*; Marriott, "Politics and Politicians," *Fortnightly Review*, December, 1918.

The Weakness of French Cabinets.—Sait, *Government and Politics of France* (and references).

The American Cabinet.—Wilson, *Constitutional Government in the United States*; Bryce, *The American Commonwealth*, and references below, p. 325.



## CHAPTER XVIII

### PRESIDENTIAL OR CONGRESSIONAL GOVERNMENT

THERE are two fundamental features which serve to distinguish the American system of government from that of the responsible parliamentary type which has been considered in the preceding chapter. One of these features is the freedom of the President from control by the Congress, and hence the Government is sometimes spoken of as a "presidential" type of government. The other feature relates to the freedom of the Congress from control by the Executive and hence the Government is also described as "congressional" in character.<sup>1</sup> Furthermore, when reference is had to the peculiar powers exercised by the standing committees in the two Houses of Congress, the American Government is spoken of as a "committee government" or "government by committees." These features will be discussed in the paragraphs that follow.

Character-  
istics of  
American  
Government

The President is constitutionally independent of Congress in that he derives his powers as the Chief Executive directly from the Constitution. The powers thus granted to him may not be abridged or their exercise in any way restrained by legislative action. Politically, also, the President is independent of the Congress in that he has a fixed term of office—four years—and owes his election to the people and not to Congress.

Position  
of President

Similarly the Congress derives its constitutional powers from the Constitution and its members are elected by the people for fixed terms of office, which terms may not be

<sup>1</sup>The federal character of the government and judicial review under a written constitution are also distinguishing features, but not with particular reference to the points of contrast with a parliamentary system.

Control over  
legislation

abridged by the President. That is, he is given no power of dissolving either or both Houses of Congress and thus necessitating new elections. He is given the constitutional power to veto measures which have passed both Houses of Congress, but this veto may be overridden by a two-third vote of both Houses. The control that is thus constitutionally given to him over legislation is a qualified one, and operates in any case only to prevent and not to compel action. He is given the right, indeed it is his duty, from time to time "to give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."<sup>1</sup> But this carries with it no obligation upon the part of Congress to give heed to the recommendations which he may see fit to make.

The President appoints the higher executive officials (subject to confirmation by the Senate) and the more important of these constitute his Cabinet. But he occupies a very different position towards his Cabinet, from that of the English Prime Minister to his Cabinet and the relation of the American Cabinet to Congress is quite different from that which the British Cabinet bears to the Parliament.

## The Cabinet

As has been pointed out, though the British Prime Minister selects the other members of the Cabinet and is their nominal head, they are his colleagues and not his subordinates—he is simply *primus inter pares*. The members of the American Cabinet are, however, the subordinates of the President who appoints them. He may and usually does ask their advice regarding matters of general policy, but he is under no political or constitutional obligation to follow it when given or tendered. His is the voice that finally determines the policy that is to be pursued. If, then, there is serious disagreement as to matters of policy between the President and any members of his Cabinet,

<sup>1</sup>U. S. Constitution, Art. II, sec. 3.

they will resign or the President will ask for their resignation. In dismissing Mr. Lansing, President Wilson maintained that "no action could be taken without me by the Cabinet, and therefore there could be no disadvantage in awaiting action with regard to matters concerning which action could not have been taken without me." Mr. Wilson's own view of the theory of the Cabinet was as follows:

"Self-reliant men," he said, "will regard their cabinets as executive councils; men less self-reliant or more prudent will regard them also as political councils, and will wish to call into them men who have earned the confidence of their party. The character of the Cabinet may be a nice index of the President's theory of party government; but the one view is, so far as I can see, as constitutional as the other." And, speaking of the President's increasingly important rôle in foreign affairs, Mr. Wilson added: "The best statesmen we can produce will be needed to fill the office of Secretary of State."<sup>1</sup>

The relation which the American Cabinet bears to Congress is also quite different from that of the British Cabinet to the Parliament. They are not members of Congress, they have no legislative initiative, they do not owe their appointment virtually to the will of Congress, and that body has no constitutional means of compelling their resignation in case it does not approve the policies for which they stand, or the manner in which they have administered their several executive departments.

It is conceivable that, as a matter of practice, the principle should develop that a President should resign who found himself in irreconcilable opposition to Congress, or that, without himself resigning, he should appoint and retain in office only those high executive officials whose policies are approved by Congress; and this principle the Congress might enforce by refusing to make the necessary

**Mr. Wilson's theories**

**Responsibility of the President**

<sup>1</sup>*Constitutional Government in the United States*, p. 77. On the cabinet, see Learned, *The President's Cabinet* and Hinsdale, *History of the President's Cabinet*.



appropriations for carrying on the government, or enacting other necessary legislation, as long as the President whom it opposed remained in office or refused to nominate to office cabinet members approved by Congress. If such a principle became firmly fixed in practice, the American system would approximate to that of the French Republic. The Congress would become the dominant organ of government, the President would lose most of his personal influence and political power, and the Cabinet members would cease to be his subordinates and become the servants of the Congress.<sup>1</sup>

In fact, however, although the government under the present constitution has been in operation for more than a century and a quarter, there has never appeared even a tendency for a system of responsible parliamentary government to develop in the United States.<sup>2</sup> The desirability has often been urged of having cabinet members appear upon the floors of the houses of Congress in order to urge legislation desired by them or by the President, or to explain or defend their administrative acts, but this innovation has never been defended upon the ground that thus the executive might be made responsible to Congress in the British sense of the word. Indeed, if anything, the present tendency is the other way, for recent years have shown an increased influence of the President over Congress rather than an increase in the power of the Congress to compel the President to accept its policies.<sup>3</sup>

In result, then, we find this marked distinction between the British and the American systems. In Great Britain the executive and the legislature work in complete harmony and coöperation. The same political party is always in

<sup>1</sup>They are now largely its servants in a purely legal or administrative sense. In the text, however, reference is had to their policy-forming functions.

<sup>2</sup>Ford, *Rise and Growth of American Politics*, Chap. XXVIII; Lowell, *Essays on Government*, Chap. I; Wilson, *An Old Master and Other Essays*, Chap. V.

<sup>3</sup>Rogers, "Presidential Dictatorship in the United States," *Quarterly Review*, January, 1919.

The position  
of Congress

Increased  
powers of  
Executive

control of both; the Cabinet, composed of the executive chiefs, largely determines the policies, but is able to remain in office only so long as a majority in the House of Commons approves them, or, at any rate, is willing to accept and ratify them. In the United States, on the other hand, the President and his advisers are not politically responsible to the Congress, and divide in fact with that body the policy-forming function. Thus, looked at in one way, the American Congress is a more influential body than is the British House of Commons, since it is far less under the control or influence of the executive. In another sense, the Congress is much the less important body, since it does not possess the power to compel the resignation of the President or of his cabinet advisers when it disapproves of their policies or administrative acts.

It is apparent that one serious defect in the American system is the possibility, indeed the likelihood, of frequent conflict between the legislative and executive branches of the government.<sup>1</sup> This conflict is possible not simply when the President belongs to a different political party from that in control of one or both of the houses of Congress, but may arise when there is not this difference. How far political party methods in the United States operate to overcome this constitutional separation of executive and legislative powers we shall presently consider, but before doing so it will be necessary to describe the procedure employed by the houses of Congress for the

Congress  
and Com-  
mons

Function of  
Political  
Parties

<sup>1</sup>In the United States, "when a difference of opinion arises, the legislature is forced to fight the executive, and the executive is forced to fight the legislature; and so very likely they contend to the conclusion of their respective terms. There is, indeed, one condition of things in which this description, though still approximately true, is, nevertheless, not exactly true; and that is, when there is nothing to fight about. Before the rebellion in America, owing to the vast distance of other states, and the favourable economical condition of the country, there were very few considerable objects of contention; but if that government had been tried by the English legislation of the last thirty years, the discordant action of the two powers, whose constant coöperation is essential to the best government, would have shown itself much more distinctly." Bagehot, *The English Constitution* (Amer. ed.), p. 87. It would be interesting to have Bagehot's views on the extreme disunion of the last two years of the tenure of Mr. Wilson, whose governmental theories he so profoundly influenced.

System of  
Congressional Com-  
mittees

exercise of its functions. And thus we are brought to the second of the two features, spoken of at the beginning of this chapter, which differentiate the American system of government not only from the British and French systems, but, in fact, from all the other systems of government anywhere else existing. This characteristic feature consists in the powers possessed and policy-forming influence exerted by the Standing Committees created by the two houses of Congress.

Shortly stated, the essential characteristics of the committee system are these:

The members of each house of Congress are grouped into a number of committees of comparatively small size each member serving on one or more of these bodies. To each of these committees jurisdiction over a particular class of subjects is assigned, and to them all proposals for legislation are accordingly sent. In most cases these proposals are in the form of drafts of laws, but in other cases the committees may themselves formulate the legislative proposals, and especially has this been true with reference to money bills. When completed drafts of proposed enactments are submitted, the committees to which they are sent may amend them, or substitute entirely new measures dealing with the same subjects.

The sources  
of their  
power

It is of the essence of the committee system that no proposals for legislation shall be debated or voted upon until they have first been referred to the appropriate committees and by them reported back to the legislative chamber itself; and with reference to certain measures, among which money bills are included, it is further provided by the Standing Rules which the houses of Congress have adopted for their own governance that, when thus reported, they shall be considered in what is known as "Committee of the Whole" and reported out by that body before they can come to a final vote.<sup>1</sup>

<sup>1</sup>See Alexander, *History of Procedure in the House of Representatives*.



Because of this rule that no measure may be acted upon by the House until it has been reported back to it by the committee to which it has been referred, it becomes of great importance that the House should be able, when it so desires, again to get possession of measures which the committees have in their charge and which they have neglected or refused to report. And the fact that, as yet, the House has not devised, or at any rate has not seen fit to institute, effective rules for doing this, is one of the reasons why these committees play such an important part in the actual process of legislation.<sup>1</sup> A principle which still further increases the influence of certain of these committees is that their reports, when made, are given a "privileged" status which entitles them to immediate consideration.

House sub-  
ject to their  
control

Still further increasing the influence of all of these committees is the fact that they are frankly made the instruments of the party in power. Formally their members are elected by the votes of the entire House. In fact they are selected and appointed by the heads of the party organizations. The chairmen of these committees and a majority of their members are always from the ranks of the majority party, which, of course, furnishes a guarantee that the policies of the party will control committee action.

Instruments  
of Party  
in power

A fourth important source of committee power is the fact that the member of the committee, usually the chairman, who reports a measure to the House, has charge of it through its subsequent legislative stages, and to a very considerable extent, controls the time allotted to its discussion by the House. This means that he is able to determine who shall speak in favor of the bill, since other persons than himself are not, under the rules, able to

Control of  
debate

<sup>1</sup>At the last session of the Sixty-sixth Congress there was a desire, on the part of a considerable number in the House, to consider the bill to regulate the packing industry (already passed by the Senate), but the Committee refused to report it. There are, it should be said, rules adopted by the Democrats (1911), but they are so complex that they are rarely used to discharge a committee.

obtain the floor for the purpose unless they have been allotted by him a certain number of minutes out of the total time at his disposal. As a matter of fairness he allots half of this time to those who are opposed to the measure, this half being allotted in bulk and apportioned to individual members by the leader of the opposition.

The rule  
of Seniority

Finally these committees have drawn to themselves influence by reason of the fact that it has become the established custom to keep members upon the same committees so long as they desire to remain upon them, and to appoint as chairmen those persons from the majority party who have had the longest service upon the committees concerned. The result is that these small bodies tend to become groups of experts within their several fields of legislation, and this, added to the fact that they have the opportunity to give thorough study to the measures before they are reported to the House, means that the recommendations of the committees made in their reports necessarily and deservedly carry great weight.

In the House of Representatives there are sixty committees, but only a few of these are of considerable importance.

Many Com-  
mittees are  
unimportant

The really political, or what may be called "government" bills in the House of Representatives, come under the control probably of no greater number of men than are usually found among the members of a ministry in the House of Commons, and the really political bills that are brought forward, it may be added, almost invariably command a majority of the House. [These men are the chairmen of the important committees.] The chief work of the House is transacted in the first instance by fewer than a dozen committees, although at times a half dozen more may be important.<sup>1</sup>

Of these committees a number have practically no matters referred to them. Others are of almost no importance from the standpoint of legislation, their functions

<sup>1</sup> McCall, *The Business of Congress*, p. 46.

relating to the management of business affairs of the House itself, as, for example, the Committees on Accounts and on Mileage, and the three committees on Contested Elections; others have to deal with details of legislative procedure, as for example, the Committee on Enrolled Bills; still others are concerned with the supervision which the House is supposed to maintain over administrative operations, as, for example, the ten committees on Expenditures in the several Departments of the Federal Government.

The Senate, until the first session of the Sixty-seventh Congress (1921), had seventy-four committees, the majority of them maintained solely because they provided clerks and committee rooms for their chairmen. Forty were abolished and no one, except perhaps the chairmen, mourned their loss. Some of them had not held meetings for years—in one case, that of the Committee on Transportation Routes to the Seaboard, for forty years.<sup>1</sup>

Change in  
Senate  
Rules

Of those committees which may be said to be legislative in character, that is, which report bills for enactment into statutes, a sharp distinction is to be drawn between those that are authorized to report supply bills and those whose functions are concerned exclusively with matters of legislation. If the American Congress followed the precedents of other nations it would keep the matters of appropriations and substantive legislation entirely separate so that no substantive legislation would be permitted to find a place in an appropriation act. Furthermore, until recently, committees which reported substantive legislative proposals also reported appropriations.<sup>2</sup> The centering of power over supply in one committee, however, has not worked any noticeable modification of the practice of riders

Legislative  
Riders

<sup>1</sup>Among the committees abolished were those on the University of the United States; Indian Depredations; Pacific Islands, Philippines (there is a Committee on Territories); Transportation and Sale of Meat Products, etc. For another change in the Senate's rules, see above, p. 283 n.

<sup>2</sup>See above, p. 282.



on appropriation bills. At the third session of the Sixty-sixth Congress—the first of the new system—forty pieces of legislation were attached to eight appropriation laws.<sup>1</sup>

Influential though the committees are, it is to be emphasized that they have no powers save those which they obtain from the House itself, and that that body, if it really desires to do so, can take a measure from their hands, and, of course, may alter or reject their proposals. And, furthermore, these committees are guided by the general principle that they are, after all, but agencies of the political party in control of the House.

Party  
Govern-  
ment

Those who framed our present National Constitution did not foresee the development of political parties which almost immediately sprang into existence and have exercised a continuously increasing influence upon the actual administration of the government. In response to the pressure thus exerted not only has the present political status of the President become very different from what it was at the beginning, and his relation to Congress considerably altered, but the procedure of Congress itself has been modified until, by successive steps, the dominant political party is able to control its deliberations and force through to enactment the measures to which it gives its support. By means of the caucus its representatives in

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<sup>1</sup>At the second session of the Sixty-sixth Congress (December 1, 1919-June 5, 1920) not a great deal of legislation unconnected with the grants of funds was attached to the Appropriation Acts in the form of riders. The Legislative, Executive and Judicial Appropriation Law (Public No. 231) abolished the sub-treasuries; the Agricultural Law (Public No. 234) created a joint committee to investigate the practicability of establishing a system of short-time rural credits; the District of Columbia Law (Public No. 245) changed the half-and-half system of appropriations in the district (see House Report No. 531; Senate Report No. 636) and transferred the administration of the School Teachers' Retirement Act from the Treasury Department to the district commissioners; the Sundry Civil Law (Public No. 246) authorized loans to relieve car shortage on the railroads, prohibited the Shipping Board Emergency Fleet Corporation from letting contracts for additional vessels and issuing periodicals, authorized the exportation of birch timber from Alaska, and contained some miscellaneous provisions on monuments and memorials, national parks, public lands, reclamation, and the Coast and Geodetic Survey; and the Third Deficiency Law (Public No. 264; 1920) provided for the payment of the transportation costs of wives married to American soldiers in Europe.

Congress are able to act as a unit, and, through the Speaker, the Floor Managers, the Chairmen of Committees, and the Committee on Rules in the House, and the Steering Committee, Floor Managers, and Chairmen of Committees in the Senate, to secure the adoption of the party measures thus agreed upon. So important is this subject that a special chapter dealing with it will be justified.

#### TOPICS FOR FURTHER INVESTIGATION

The Merits of Parliamentary Government.—Bagehot, *The English Constitution*; Wilson, *Congressional Government*; Sidgwick, *Elements of Politics*; Wilson, *An Old Master and Other Essays*; Ford, *The Rise and Growth of American Politics*; Dicey, "A Comparison between Cabinet Government and Presidential Government," *Nineteenth Century*, January, 1919.

The Merits of Congressional Government.—Lowell, *Essays on Government*; Snow, "Defence of Congressional Government," *Papers of the American Historical Association*, Vol. III; "Cabinet Government in the United States," *Annals of the American Academy of Political and Social Science*, No. 57; "Shall We Americanize our Institutions?" *Nineteenth Century*, December, 1890; Dicey, *op. cit.*

The Committee on Rules of the House of Representatives.—Alexander, *History of Procedure in the House of Representatives*; *House Manual and Digest*; *American Political Science Review*, Vol. XIII, p. 25 and Vol. XIV, pp. 74, 659, etc.

The Speaker of the House of Representatives.—Follett, *The Speaker of the House of Representatives*; Fuller, *The Speaker of the House*; Munro, *The Government of the United States*, and above, p. 259.

The Powers of Congressional Committees.—Reinsch, *American Legislatures and Legislative Methods*; McConachie, *Congressional Committees*; McCall, *The Business of Congress*.

V

## CHAPTER XIX

### POLITICAL PARTY CONTROL IN CONGRESS

Are Political  
Parties  
Necessary?

IT IS a fair question that may arise in any country whose government is subject to the control of public opinion whether it is desirable that the pressure and control of this opinion should be exerted through political parties; that is, whether the members of the electorate should be encouraged to cast their votes or otherwise exert their influence through organizations with more or less definitely determined political principles, or whether they should act, each independently, uncontrolled by party promises and affiliations.<sup>1</sup> And the same question applies to the representatives whom they elect—whether they should act within party lines or according to their own several and independent judgments.

It has earlier been pointed out that at the time the Union was established there was no expectation that political parties would arise and assume the importance which they have since obtained. The American people were, indeed, warned not to allow this to come to pass. In fact, however, the very kind of government which the Constitution provided was one which made it practically indispensable that political parties should be established and, to a very considerable extent, direct the operations of the government. This necessity arose mainly out of the fact that has been dwelt upon in the preceding chapter

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<sup>1</sup>"In truth, Party preserves us from political degeneracy. I am convinced that, should the spirit of Party ever lie dormant in the country, the House of Commons would become but the meeting place of 'cranks' and 'faddists,' and nothing would be heard there but the murmur of bees in the bonnets of daft members." MacDonagh, *The Pageant of Parliament*.



that the American constitutional system is one that separates the legislative and executive functions of government, vesting their exercise, so far as is possible, in departments independent of each other.

This separation was dictated by an unwillingness to place so much power in the hands of particular individuals that they might be able to throw off the control of constitutional limitations and oppress the people. In practice, however, it soon became evident that the government could not be made to operate efficiently, nor could the people make their will controlling, unless some means were devised whereby the same public policies would govern both the Congress and the President in the exercise of their policy-forming functions. Thus in America there has been a special need for political parties. Their function has been not only to provide a means whereby the popular will may be organized, given more or less definite formulation, and made controlling in the legislature—a function that they exercise in all popular governments—but also, they have been needed in order, so far as is possible, to bring into harmonious working relations the legislative and executive branches of government, which the Constitution, in obedience to the doctrine of “separation of powers,” has made independent of each other. Viewed in this light, therefore, it is not surprising that in the United States political parties should have obtained a more highly organized character, and the machineries which they have created have become more controlling than is the case in other countries.

There can be no question that this development of political party machinery and control has been accompanied by serious evils, for it has often happened, and at the present time is largely the case, that the people have not been able to control the party machines which they have created, with the result that, not infrequently, those who are in control of them are able to use them for selfish

“Separation  
of Powers”  
Theory

Character  
of American  
Parties

**Control by  
people**

or corrupt purposes. And it is the attempt of the voters to regain and maintain an adequate control of their own political party organization which in large measure explains the agitation for the adoption of such agencies as the initiative and the referendum, the recall, and primary nominations—that is, nominations by direct vote of the members of a party rather than by the nominally representative bodies, the conventions.

**Parties in  
Congress**

There are some persons who are so impressed with the evils which have been the outcome of political parties as they are organized and operate in the United States that they would seek every possible means of weakening their control over the government. That is an extreme view. Control by the voters over their party organizations is essential, but it is equally true that the public will cannot be effectively exerted over the policies of the government except through the agency of party. And it is the purpose of this chapter to show how, in fact, this control is exercised so far as the Congress of the United States is concerned.

It has already been shown that the houses of Congress are organized upon a frankly partizan basis so far as their standing committees are concerned. The same is true as to the means that are provided for determining what measures shall come up for a final vote, how long they shall be debated, what amendments may be offered, etc.

**Party Con-  
trol of the  
House**

This party control is more stringent in the House of Representatives than it is in the Senate, largely because of the greater size of the former body. Thus, while in the Senate we have a so-called "Steering Committee" composed of the leaders of the dominant party, which exercises a powerful control over the business of the Senate, we do not find provision made in the rules of procedure of that body for such dominating authority as is vested by the rules of the House of Representatives in the "Committee

on Rules.”<sup>1</sup> This Committee, which is controlled by the party in the majority, has the authority to report at any time resolutions which need only a majority vote for their adoption, which determine what measures shall come up for discussion, to what extent they shall be open to amendment, and when the final vote shall be taken. Thus it is seen that the party in power has the means by which it can make its will effective whenever it desires to do so.

Rules of procedure in legislative bodies, once a matter of convenience, have now become weapons of political and personal warfare. Nowhere is this more evident than in the American Congress. In the House of Representatives individual members are ready to seize every opportunity afforded by the rules to make themselves prominent and embarrass those who have the pending measure in charge; and when action is to be taken by the House, guillotine is almost always used. The proposed programme is reported by the Committee on Rules and the House proceeds to a cut-and-dried decision determined upon by the leaders. There is no real deliberation. In the Senate, the situation is different; inability to limit debate enables obstruction to be successfully resorted to by a few senators.

The consideration of the Bonus Bill, for example, involved a very important question of procedure and illustrated the fact that the House is not a deliberative body but is controlled by a few leaders. The Republican Steering Committee had considered various forms of closure and had apparently determined upon a rule limiting debate to five hours, preventing amendments, and allowing

Dominance  
of leaders

Control of  
debate

<sup>1</sup> See for example, Senator McCumber's speech on May 20, 1920, *Congressional Record*, p. 7921. Senator Kenyon, however, said that he did "not recognize the right of any small assembly of men on either side of the Chamber, after bills have been reported from committees to the Senate, following full discussion and consideration, to say that such bills shall not be considered by the Senate except as they may say." Senator Johnson spoke to the same effect. The chief objection seemed to be that the Steering Committee would give no opportunity for considering the Nolan-Johnson Minimum Wage Bill and legislation designed to regulate the meat industry. Senator McCumber made a spirited defence of the work of the committee.



a single motion to recommit. There was a good deal of opposition to this, but the measure was finally forced through with the House even more effectively, although not so openly, gagged.

On May 29, 1920, the Rules Committee proposed a rule, "That it shall be in order for six legislative days, beginning May 29, 1920, for the Speaker to entertain motions of members of committees to suspend the rules under the provisions provided by the general rules of the House." The rules of the House provided that "the Committee on Rules shall not report any rule or order which shall provide that business under paragraph 7 of Rule XXIV (Calendar Wednesday) shall be set aside by a vote of less than two thirds of the members present; nor shall it report any rule or order which shall operate to prevent the motion to recommit being made."

Guillotine

Suspension  
of Rules

The point of order was made that the Rules Committee's proposal required a two-third vote so far as Calendar Wednesday was concerned and with respect to eliminating the motion to recommit was not privileged and must take its place on the calendar. Speaker Gillett made a ruling so doubtful that he was sustained by a vote of only 192 to 189, which, in view of the large Republican majority in the House, was rather remarkable.

"It seems to the Chair," he said, "that the Committee on Rules is not permitted to do anything which directly dispenses with Calendar Wednesday or with the motion to recommit, but it can bring in a general rule, like the present one, which indirectly produces that result as a minor part of its operation.

"Of course this resolution is brought in, as we all know, on the anticipation that the House will adjourn next Saturday. If a resolution to adjourn should be brought in by the Committee on Rules and passed by the two Houses, that makes the suspension in order for the next six days; that would dispose of Calendar Wednesday and

the motion to recommit. Would any one contend that on that account it was out of order? The Chair thinks that this motion is not so directly aimed at the rule which provides for Calendar Wednesday and the motion to recommit as to make it out of order."<sup>1</sup>

Thirty minutes of debate to a side were allowed on the rule which was adopted by a vote of 220 to 165. Mr. Fordney immediately moved "that the rules be suspended and that the House pass the bill H. R. 14157, known as the Soldiers' Bonus Bill." Twenty minutes a side were allowed on this, the rules were suspended, and the bill passed by a vote of 289 to 92. Concerning this situation Congressman Mann, Republican, and one of the ablest parliamentarians in the House, had the following to say:

Amend-  
ments im-  
possible

Here is the situation: Congress has been in almost continuous session for more than a year. The Republican side of the House has had a reasonably large majority. If we say to the country, as we will if this resolution be passed, that the Republican majority in this House, with a year's time, has been unable to bring in legislation and perfect it where it is subject to amendment, it acknowledges its impotency and its incapacity. It will be called to your attention and to your constituents on every stump that the Republican majority of the House has not enacted much reconstructive legislation, and then it will be told in addition that the Republican majority of the House was afraid to enact legislation under ordinary rules and was incapacitated from following the ordinary practice. What will you answer when men say to you that a Republican majority in the House passes a revenue bill raising a billion and a quarter of dollars without a chance to amend it? No party in the history of the country has ever passed a revenue bill under suspension of the rules.<sup>2</sup>

Mr. Mann's  
criticism

The same form of guillotine was resorted to when the House of Representatives considered the joint resolution terminating the state of war with Germany. The Committee on Rules reported (April 8) a special rule fixing debate on the Peace Resolution from eleven to five the next

The Peace  
Resolution

<sup>1</sup> *Congressional Record*, May 29, p. 8543.

<sup>2</sup> *Ibid.*, May 29, p. 8546.

day.<sup>1</sup> At five o'clock the previous question was considered as ordered without any intervening motion except one to recommit. Amendments were impossible. The House had to take the resolution or leave it.<sup>2</sup>

These are extreme cases. For the most part the House operates under a more benevolent leadership which is governed by the party will and not that of individual members. It has, therefore, been necessary to provide some agency for determining the policies upon which the members of the parties represented in the House will unite, and thus to furnish guidance to their leaders upon the floor of the House. This agency is known as the Legislative Caucus.<sup>3</sup>

A legislative caucus is the meeting together of the members of a given political party in order that the party may thus determine what its action, as a party, shall be upon the legislative floor. Each party in each house of Congress thus has its own caucus meeting separately. It meets in the legislative chambers, has its own officers and rules of procedure, and conducts itself, in fact, as a deliberative body.

The Democratic caucus of the House of Representatives, in 1913, formally adopted the following rules, which are so important that they should be set forth in full:

#### PREAMBLE

In adopting the following rules for the Democratic caucus we affirm and declare that the following cardinal principles should control Democratic action:

<sup>1</sup>*Congressional Record*, April 8, p. 5336.

<sup>2</sup>For other comments on congressional procedure, with particular reference to the difficulty of keeping a quorum, the range that "debate" takes, etc., see Rogers, "American Government and Politics," *American Political Science Review*, Vol. XV, p. 71 (February, 1921).

<sup>3</sup>An interesting comparison can be drawn between the Congressional Caucus and the British Cabinet. The former is one means by which we have been feeling for coördination in our system which lacks the coördination and leadership furnished definitely by the Cabinet, where that type of government is in force. The caucus is more democratic because it admits all party men (in the House or Senate). There is much to be said in favor of a single caucus for both houses. This might lessen the evils of bicameral government and make more effective the President's connection with the caucus.



- (a) In essentials of Democratic principles and doctrine, unity.
- (b) In non-essentials, and in all things not involving fidelity to party principles, entire individual independence.
- (c) Party alignment only upon matters of party faith or party policy.
- (d) Friendly conference and, whenever reasonably possible, party coöperation.

#### RULES

1. All Democratic members of the House of Representatives shall be *prima facie* members of the Democratic caucus.

2. Any member of the Democratic caucus of the House of Representatives failing to abide by the rules governing the same shall thereby automatically cease to be a member of the caucus.

3. Meetings of the Democratic caucus may be called by the chairman upon his own motion, and shall be called by him whenever requested in writing by 25 members of the caucus.

4. A quorum of the caucus shall consist of a majority of the Democratic members of the House.

5. General parliamentary law, with such special rules as may be adopted, shall govern the meetings of the caucus.

6. In the election of officers and in the nomination of candidates for office in the House, a majority of those present and voting shall bind the membership of the caucus.

7. In deciding upon action in the House involving party policy or principle, a two-thirds vote<sup>1</sup> of those present and voting at a caucus meeting shall bind all members of the caucus: *Provided*, That said two-thirds vote is a majority of the full Democratic membership of the House: *And provided further*, That no member shall be bound upon questions involving a construction of the Constitution of the United States or upon which he has made contrary pledges to his constituents prior to his election or received contrary instructions by resolution or platform from his nominating authority.

8. Whenever any member of the caucus shall determine, by reason of either of the exceptions provided for in the above paragraph, not to be bound by the action of the caucus on these questions, it shall be his duty, if present, so to advise the caucus before the adjournment of the meeting, or, if not present at the meeting, to promptly notify the Democratic leader in writing, so that the party may be advised before the matter comes to issue upon the floor of the House.

9. That the five-minute rule that governs the House of Representatives shall govern debate in the Democratic caucus unless suspended by a vote of the caucus.

Control of  
Party by  
majority of  
members

<sup>1</sup>In practice this became a simple majority.

10. No persons except Democratic members of the House of Representatives, a caucus journal clerk, and other necessary employees, shall be admitted to the meetings of the caucus.

11. The caucus shall keep a journal of its proceedings, which shall be published after each meeting, and the yeas and nays on any question shall, at the desire of one fifth of those present, be entered on the journal.<sup>1</sup>

#### How the Caucus Works

The extent to which the business of legislation, as carried on in Congress, was dominated and controlled by this caucus, may perhaps be best illustrated by quoting from the *American Year Book for 1913*.<sup>2</sup> The writer shows, in a matter-of-fact way, the manner in which Congress worked. Speaking of the organization of the Senate in December, he says:

Within the Democratic majority in the Senate the radical or progressive element was in full control. In the first caucus, on March 5, the conservatives surrendered the party leadership held during the Sixty-second Congress by Senator Thos. S. Martin (Va.). John W. Kern (Ind.), Mr. Bryan's running mate in 1908, was elected without opposition to the chairmanship of the Democratic caucus, which carries with it floor leadership in the Senate. The caucus on March 5 created a new "steering committee" of nine members and delegated to it extensive general powers of direction over the work of the party in the Senate. In a second caucus on March 6 seven progressives were elected on Mr. Kern's nomination to this most influential body.

#### Powers of Steering Committee

The first important task of the steering committee was the assignment of the Democratic members to the committees of the Senate. The Democratic assignments were confirmed in caucus on March 15 and on the same day the Senate completed the election of the committees. Heretofore, a committee's meetings had been called by the chairman. He named sub-committees and conferees, and those often determined the fate of important measures. Under the new *régime*, the Democratic "steering committee," with Senator Kern as chairman, assigns members to their committees, subject to the action of the Democratic caucus; the committees name their own chairman by majority action and conferees are named by the same vote. This means that the chairman is merely a presiding officer with no

<sup>1</sup>Quoted from *Congressional Record*, Vol. L, p. 5245.

<sup>2</sup>*American Year Book*, 1913, p. 20.

more prestige or authority than any of the other members and he cannot check the programme of the majority. Party action in each house is determined by the party caucus, and the party through its caucus and floor leaders promotes or retards public measures and is held responsible for its conduct. It is in the party caucus of the majority party that decisions are made and legislation is formulated and determined upon.

Describing the organization for business of the House of Representatives, he continues:

The initial steps in the organization of the House of Representatives were taken in a caucus of 270 members of the Democratic Majority on March 5. Here the moderate conservatives assumed complete command and established a harmony in striking contrast with the conflict of tendencies within the Senate Democracy. Without a dissenting voice the caucus chose A. Mitchell Palmer (Pa.) to succeed Mr. Burleson as chairman of the caucus, reelected Oscar W. Underwood (Ala.) as floor leader of the party in the House, and nominated Champ Clark (Mo.) as the party's candidate for Speaker. It continued as members of the Democratic representation in the Committee on Ways and Means, the eleven members of the former committee reelected to the Sixty-third Congress, and supplied the three vacancies with members in sympathy with the ideas of their colleagues. The Democratic members of the Committee on Ways and Means perform for the party in the House most of the functions of the "steering committee" of the Senate Democrats. Hence the caucus at once ensured the continuity of the tariff policy of the party in the House and committed the party to a general policy of moderate conservatism.

Organiza-  
tion of the  
House

The following resolutions adopted by the caucus with reference to the two most important measures coming before it will further indicate the effect of caucus rule:

*Resolved*, That the Tariff Bill passed by this caucus in its amended form is declared to be a party measure and that the members of this caucus are hereby pledged to report the bill in the House of Representatives and to vote against all amendments or motions to recommit the bill: *Provided*, however that the Ways and Means Committee are authorized to propose amendments to the bill that shall not be considered as included in the foregoing inhibition.

Approval  
of measures

*Resolved*, That the Currency Bill, adopted by this caucus, be



declared a party measure and the members of this caucus are pledged to vote for the bill to its final passage without amendment. *Provided*, that the Banking and Currency Committee may offer amendments in the House.

Caucus in  
Committees

The caucus method which is thus illustrated is often carried over into the standing committees of the House and the Senate, to which are entrusted the preparation and report of bills for enactment. The majority members of the committee frequently meet in a caucus of their own, draft a bill of which they approve, prepare a report upon it, and then, and not until then, give the minority of the committee the barren privilege of dissenting from it if they care to go through that formality. While this majority caucus is holding its meetings the minority members have, indeed, been excluded from their own committee room.

The results that follow from such caucus practice are obvious, and very important.

In the first place it means the definite acceptance of party government in all its strictness.

Individual  
influence  
lessened

In the second place it clearly lessens the independence of the individual representative as a member of the legislative body. If he does not go into the caucus of his party, he thereby, to that extent, separates himself from his party and if this refusal to coöperate is frequent or with reference to important matters, he practically ceases to be recognized by the party organization as entitled to any of the consideration which is given to a party member. If he does go into the caucus he pledges himself in advance to abide, with few exceptions, by all the decisions which may be made.

Minority  
Party is  
ignored

In the third place it is apparent that by the operation of the caucus the minority party is practically deprived of all participation in legislation with reference to matters which are declared party measures. The arena of debate is, for all practical purposes, transferred from the floor of the legislative chamber to the caucus room of the majority party. Since it is there decisively determined how

the majority of voters in the legislative body are to cast their votes upon pending or proposed measures, it is clear that the actual debate upon them that may be later had upon the legislative floor can have no influence other than what it may have upon the public, or at least upon that part of the public which reads the reports of the debate.<sup>1</sup>

The Caucus  
and Party  
Government

Enough has been said to show how intimately the caucus system is bound up with the idea of party government, and how far its adoption secures the realization in practice of the principle upon which party government is founded. The caucus rules have been somewhat relaxed, but even if they were applied in a most rigorous manner, party governmental machinery in this country would by no means be perfected.

The policies of the national political parties find their most definite and authoritative statement in the platforms adopted at the national conventions which are held every four years for the primary purpose of selecting party nominees for the Presidency and Vice-Presidency. The platforms have, however, from the standpoint of party governmental efficiency, several very serious defects. Leaving aside the facts that they are usually stated in general and often purposely vague terms, and often "straddle" rather than definitely pronounce upon current issues—defects which are accidental rather than inherent in this mode of expressing the party's policies—there are the following fundamental defects: that the declaration of the platform

Party Plat-  
forms

<sup>1</sup>It should be recognized that a caucus system may mean minority rule of the most tyrannical type. Suppose, for example, that the House of Representatives is divided between the two parties rather evenly—225 to 210, let us say. The majority party may decide upon a particular course of action by a vote of 125 to 100, and if the action of the caucus is binding, the House would follow the will of the 125, when, as a matter of fact, on the basis of their opinions, the members would be opposed by 310 to 125—that is, the minority in the caucus vote, plus the minority party. This illustration of course, assumes a rather extreme instance of differing opinions, but it will, we think, serve to indicate one danger of caucus rule. This, however, is a necessary incident of party government, with the beneficial result of furnishing definite, corporate, and continuous responsibility to the electorate. See Bryce, *Modern Democracies*, Vol. II, p. 355.

has not been generally held mandatory upon the party; that those who frame and adopt the platform are not the same persons who are to carry it into legislative effect; and, finally, that only once in four years is the opportunity given to the party thus formally to declare before the country its policies.

President Wilson plainly saw those defects and suggested in one of his annual messages a means of correcting the most important one of them. He said:

Mr. Wilson's proposals

I venture the suggestion that this legislation should provide for the retention of party conventions, but only for the purpose of declaring and accepting the verdict of the primaries and formulating the platforms of the parties; and I suggest that these conventions should consist not of delegates chosen for this single purpose, but of the nominees for Congress, the nominees for vacant seats in the Senate of the United States, the Senators whose terms have not yet closed, the national committees, and the candidates for the Presidency themselves, in order that platforms may be framed by those responsible to the people for carrying them into effect.<sup>1</sup>

This suggestion if carried into effect would of course mean that practically the same persons who framed the formal statement of the party's promises to the people would be the ones who, in Congress, would have the power to enact the laws for carrying them out. Furthermore, this would undoubtedly have the effect of rendering the platforms practically mandatory upon representatives of the party in power—a mandate which they would have the absolute power to obey through the caucus and other legislative modes of procedure which have been mentioned.

Presidential Nominations

In the same message, President Wilson recommended legislation to modify the convention system with respect to nominations. He urged "the prompt enactment of legislation which will provide for primary elections throughout the country at which the voters of the several parties

<sup>1</sup> Annual Message, December 2, 1913.



may choose their nominees for the Presidency, without the intervention of nominating conventions." Congress felt, however, that there was a very serious question as to whether it had the constitutional authority to pass the legislation which Mr. Wilson urged; the presidential electors are chosen by the states in any way they see fit, and there is no grant of power to the Federal Government to deal with party organizations or nominating machinery.<sup>1</sup> Consequently, Congress took no action. Divergent opinions are held as to the merit of a national primary system; there is some virtue in the objection that state lines will be obliterated, that the quality of candidates—already distressingly low<sup>2</sup>—may be reduced, and that too many candidates might force the nomination by a minority, unless some form of preferential ballot were used, and this Mr. Wilson did not propose. Presidential primaries to select the state delegates to the nominating conventions have not been very successful, and, indeed, there seems to be a rather widespread dissatisfaction with the primary system.<sup>3</sup>

The Primary  
system

Any effective primary system would mean, of course, that the person thus selected by the votes of the party as its candidate for the Presidency would be the indubitable political leader of his party, and would almost surely be able to dictate to the convention the platform to be adopted. For the nominee would have made a more or less personal campaign for the nomination, or at any rate the policies of which he personally approved would have

President  
as leader  
of Party

<sup>1</sup> But cf. the decision of the United States Supreme Court in the Michigan Senatorial Election case, May, 1921. *Newberry v. U. S.*, No. 559, October Term, 1920.

<sup>2</sup> See Lord Bryce's discussion of "Why Great Men Are Not Chosen President," *The American Commonwealth*, Vol. I, Chap. VIII.

<sup>3</sup> For an excellent discussion, see R. S. Boots, "The Presidential Primary," *Supplement to the National Municipal Review*, September, 1920. See also Barnett, "The Presidential Primary in Oregon," *Political Science Quarterly*, March, 1916; Laprade, "The Nominating Primary," *North American Review*, August, 1914; Merriam, *American Political Ideas: 1865-1917*, p. 281 (and references); and Bryce, *Modern Democracies*, Vol. II, p. 130 ff.

Control of  
the Platform

been known, and he could thus, very properly, take the position before the convention that his policies had been approved by the individual voters who made up the body of the party. And this in turn would of course mean that the political prestige and power of the President, already so great, would be still further increased, so that he would have even less difficulty than President Wilson had in securing the legislation that the executive demands.<sup>1</sup> President Wilson, with seeming humility and self-abnegation, declared that he did not feel himself authorized to urge upon Congress any measure upon which the party had not set its imprimatur in the platform. But if the time comes when the President, by reason of a change in the nominating machinery, is able to dictate what that platform shall be, it is clear that this self-denying declaration will not operate as a considerable limitation upon his political power.

Party Gov-  
ernment  
essential

Space cannot be spared to pursue the point further. Sufficient has been said, however, to show that recent methods of legislative procedure at Washington, which have been so often criticized, have a reasonable basis, and are open to objection only by those who would go back to the methods and ideals of the eighteenth century. But this is impossible, and would be undesirable if it were possible. We are in this country definitely committed to party government, by the Republicans no less than by the Democrats. Ex-President Taft, in an article dealing with the future of the Republican party, has declared:

This is a government by parties and there should be party responsibility. When a policy has been pledged the party should carry it out, and the leader who leads his party to performance is to be commended.<sup>2</sup>

But this, of course, cannot be done unless a machinery is perfected and legislative methods adopted which will

<sup>1</sup>See Rogers, "President Wilson's Theory of His Office," *The Forum*, February, 1914.

<sup>2</sup>*Saturday Evening Post*, February 14, 1914.

enable the party in power to act as a party, that is, act as a unit upon administrative measures, and, by maintaining an effective control over the time and order of business of the legislature, overcome all resistance and obstruction that may be made by those in the minority. When these means of effective action are existent, the people can hold the party in power to responsibility with reference to the manner in which their campaign promises are kept, for then the claim can no longer be made that the best efforts possible were made to do that which had been promised, but that the wheels of the legislative machinery could not be made to revolve.

In short, then, it is good public policy, and in strict conformity with the principles of popular government, that the party machinery should be made effective even though this means, upon the one hand, that the independence of the individual representative is greatly lessened, and, upon the other hand, the power of the entire body of the minority members reduced to that of criticism, and, perchance, of advice.

As has been already suggested, in England party government, party discipline, and party responsibility have been pushed to almost the extreme to which it is possible to advance them. It is plain that here in the United States we are traveling the same road, and of recent years have been making especially rapid progress upon it. But, owing to our peculiar constitutional structure, it is only at times that we are able to make our party machinery operate effectively. The adoption of President Wilson's plan of presidential primaries, and the reconstituting of the national conventions so as to have the party platforms drawn up by the same persons who later are to carry them into execution, and the potency in the legislative halls of such agencies as the caucus, steering committees, committees on rules, the limitation of debate, etc., would be effective only when the same political party happens to be

But Parties  
must be  
controlled

Tendencies  
toward  
Legislative  
Responsi-  
bility



Influence of  
Upper  
Chambers

in control of both branches of Congress and in possession of the presidential chair. In England there is not this difficulty. For many years the Crown has played no real part in legislation, and the House of Lords comparatively little, and even that little has been recently reduced to a minimum because the Lords a few years ago saw fit to interpose their objection to matters which the House of Commons approved and deemed important. In Canada, where the English cabinet or parliamentary system prevails, the Upper House did recently defeat an important measure approved by the Lower House, but the comments which that action occasioned made plain that, if this policy of the Canadian Senate were continued, the power of that body would surely be taken from it. In South Africa and in Australia also, where the English system prevails, elaborate constitutional methods of overcoming "deadlocks" between the two branches of the legislature are provided, and in each case make it possible for the lower and more popular branch to have its way if it is firm in its decision, and the action proposed is supported by an emphatic majority. Whether or not, in our own country, the demand for effective party government in all circumstances will become so imperative that the constitutional changes necessary to satisfy it will be made, remains for the future to reveal. It is important, however, that everyone interested in the political welfare of his country should appreciate the elements of the problem that confronts us and be aware of the direction in which we are moving.

## TOPICS FOR FURTHER INVESTIGATION

The Extra-Constitutional Position of American Parties.—Wilson, *Congressional Government*; Bryce, *The American Commonwealth*; Ford, *The Rise and Growth of American Politics*; McLaughlin, *The Courts, the Constitution, and Parties*; Orth, *The Boss and the Machine*; and see above, 147.

Presidential Primaries.—For references, see above. p. 347.

The Development of the Congressional Caucus.—Thompson, *The Rise and Fall of the Congressional Caucus*; Alexander, *History of Procedure in the House of Representatives*; McCall, *The Business of Congress*; *The American Year Book* (1913-1919).

The Influence of the President on Congress.—Roosevelt, *Autobiography*; Ogg, *National Progress: 1907-1917*; Beard, *Contemporary American History*; *The American Year Book* (1913-1919), Taft, *Our Chief Magistrate and His Powers*; Bishop, *Life and Letters of Theodore Roosevelt*; Dodd, *Woodrow Wilson: The Man and His Work*.

Party Management in England and in the United States.—Lowell, *The Government of England*; Bryce, *The American Commonwealth*; and see above, p. 146 ff.

## CHAPTER XX

### STRONG MONARCHICAL GOVERNMENT

#### I. THE PRUSSIAN CONSTITUTION<sup>1</sup>

THE parliamentary system of Great Britain, as modified in her Dominions and in several of the States of Europe, and the legislative system of the United States and its constituent states, represent distinct types of government. A third distinct type is that best illustrated by Prussia, most of the other states of Germany, and Austria and Hungary. It is also illustrated in a pure form in Japan.

Monarchical  
Govern-  
ment

To this system may be given the term "strong monarchical government," because, under it the personal powers of the monarch are very great, not simply in legal form as in Great Britain, but in actual operation and exercise. And, as a result of this it will be found that the part played by the representative legislative chambers is quite different from that played under the systems which have thus far been considered.

Theory of  
the State

As a rational foundation upon which to erect their constitutional structure, the Prussians started with conceptions of the nature of the State and of the ethical source of the right of governments to exist and of particular persons to rule them, which were fundamentally different from those that are accepted in America and in most of the other countries of the civilized world. It will not be possi-

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<sup>1</sup>The Prussian Government was so typical of the monarchical type, and was so much an issue in the war, that, even though now obsolete, it is considered in this discussion in connection with the Government of Japan, constructed in imitation of it. The substance of this account of the Prussian Constitution is taken from Willoughby, *Prussian Political Philosophy*.



ble here to state this philosophy even in outline,<sup>1</sup> but it may be said that not only was an exalted estimate held as to the practical merits of strong monarchical government, but the doctrine declared that it did not lie within the proper province of the people to determine what form their government should take, or who should be in charge of it. Indeed, it was asserted by the Prussian King that his right to the throne was derived directly from God and not by delegation from his subjects.

The divine  
right of  
Kings

In republics, as we have already learned, the principle is fundamental that all powers of the government are derived by grant from the people. This principle, though not essential to, is nevertheless not inconsistent with, the maintenance of monarchical rule. It is inconsistent only with the doctrine that the King rules by reason of an original personal right, and that he possesses other than delegated powers.

That all public authority is derived from the people is accepted in the constitutional system of Belgium, its Constitution, dating from 1831, declaring that "all powers emanate from the people," and are to be exercised in the manner established by the Constitution. Care is also taken to provide that the executive powers vested in the King shall be "subject to the regulations of the Constitution."<sup>2</sup>

Theory of  
Popular  
Sovereignty

In Great Britain, if we have regard only to legal theory as distinct from actual practice, the Crown is viewed as the organ of government in which sovereignty inheres. It will be observed that the term "Crown," and not "King" or "monarch," is here used as the name of an office or organ of the government, for, since 1688, the constitutional principle has been established that the people through their representatives in Parliament may determine who shall be entitled to occupy the throne. Thus King George

<sup>1</sup>For such a statement see W. W. Willoughby, *Prussian Political Philosophy*.

<sup>2</sup>Dodd, *Modern Constitutions*, Vol. I, p. 126.

of England lays no claim to other than a parliamentary title. And, furthermore, it is recognized as a matter of constitutional practice that the representatives of the people may withdraw from the Crown any of the independent or so-called prerogative rights which it still has, and that, even as to the rights still retained, they must in every case, in practice, be exercised at the direction of the King's ministers, who are held politically responsible to Parliament for the directions which they may give.

In effect, then, so far as the substance is concerned, the government of Great Britain is as subject to the popular will as are the governments of the republics of France and the United States. There are, indeed, not a few who assert that through the operation of her system of cabinet control the British government is more responsive to the will of the people than is the government of the United States. In Italy also the parliamentary system has developed which brings the acts of the King under the control of his ministers, who are responsible to the elected representatives of the people.<sup>1</sup>

In sharp contrast, as regards both constitutional theory and constitutional practice, were the monarchical systems of the states of Germany,<sup>2</sup> and especially that of Prussia. The Prussian government was a constitutional government in the sense that the jurisdiction of its various organs and officials, including the King, was legally defined and the individual protected against official acts for which no legal warrant existed. Upon this score no reproach lay against the Prussian monarchy. It may indeed be true that the control exercised by the government over the lives of its subjects was a rigorous and paternalistic one, and that there was no sphere of individual liberty constitutionally secured against governmental invasion, such as is the case in the United States; but, nevertheless, *ultra*

<sup>1</sup>Dodd, *op. cit.*, Vol. II, p. 1.

<sup>2</sup>Excepting of course the "free cities" of Lübeck, Bremen, and Hamburg.

*vires* or otherwise illegal or purely arbitrary acts upon the part of public officials were as little and perhaps less known in Prussia than in our own country. Prussia's government was one of law and not of unregulated individual caprice.

The Prussian King, then, governed in accordance with methods presented by the Constitution, and this meant that he might promulgate as laws only those measures which had received the approval of his legislature, one branch of which was selected by a more or less numerous electorate to represent the wishes and interests of the people. None the less, as a constitutional principle, in accordance with his claim of personal right to the throne, he was regarded as the sole foundation and source of all law and political authority, and the sole bearer and exerciser of the sovereignty of the State, notwithstanding the fact that, by the grant of a written constitution, he had posited for himself certain forms in conformity with which his powers were to be exercised, and agreed that in the determination of certain policies he would take no action without the approval of a majority of representatives, elected by the people, or at least, by a certain fairly large part of them. The written constitution of Prussia in which this undertaking was embodied, may have been, as a matter of practical fact, extorted from the King by popular pressure; but, legally, it was an emanation from his sovereign will. It was granted or "octroyed" by him, and not established by the people; and this is shown by its phraseology, the preamble beginning with the words, "We, Frederick William, by the Grace of God, King of Prussia, etc., hereby declare and make known," etc.

That after as well as before the granting of the constitution, the King remained the embodiment of sovereign power, was the consensus of German jurists. "He possesses the whole and undivided power of the State in all its plenitude," says Schulze in his *Preussisches Staatsrecht*. "It would therefore be contrary to the nature of the

Constitution  
granted by  
King

Not estab-  
lished by  
the people



monarchical constitutional law of Germany," he continues, "to enumerate all individual powers of the King, or to speak of royal prerogative. . . . His sovereign right embraces, on the contrary, all branches of the government. Everything which is decided or carried out in the State takes place in the name of the King. He is the personified power of the State."

Nature of  
Constitu-  
tional Law

To the same effect is the statement of Von Rönne in his standard treatise on *Das Staatsrecht der preussischen Monarchie*.

"As in constitutional monarchies in general," he says, "so in the Prussian State, the right of the supreme direction of the State belongs exclusively to the King as its head, and no act of government may be performed without his assent or against his will. All the prerogatives of the State are united in his person, and his will is supreme, the officials being only organs through which he acts. The constitution, it is true, does not expressly set forth these principles, but they have been already legally formulated in the Prussian law, and are, moreover, a necessary consequence resulting from the very nature of monarchy."<sup>1</sup>

Position of  
the King

Especially significant, also, was the statement of the Constitution itself (Article 108) that a "swearing-in of the army upon the Constitution does not take place." The army's allegiance, in other words, was directly to the King; and even in the Constitution of the Empire, it was provided that soldiers "shall render unconditional obedience to the orders of the Emperor." (Article 64.)

It is to be remembered, furthermore, that a written constitution had not in German public law that supremacy over ordinary statute law which is ascribed to it by American constitutional jurists. Constitutional law and ordinary legislation were both, legally speaking, an ema-

<sup>1</sup>These two passages are quoted by Prof. J. H. Robinson in the historical and analytical note prefixed to his translation of the Prussian Constitution, published as a *Supplement* to the September, 1894, issue of the *Annals of the American Academy of Political and Social Science*.

nation from the will of the monarch. The leading commentary upon German constitutional law is undoubtedly that of Dr. Paul Laband. In his *Staatsrecht des deutschen Reiches* he writes as follows:

Opinions of  
German  
Jurists

There is no will in the State superior to that of the sovereign, and it is from this will that both the constitution and laws draw their binding force. The constitution is not a mystical power hovering above the State; but, like every other law, it is an act of its will, subject, accordingly, to the consequences of changes in the latter. A document may, it is true, prescribe that the constitution may not be altered indirectly (that is to say, by laws affecting its content), that it may be altered only directly, by laws modifying the text itself. But when such a restriction is not established by positive rule, it cannot be derived by implication from the legal character of the constitution and from an essential difference between the constitution and ordinary laws. The doctrine that individual laws ought always to be in harmony with the constitution, and that they must not be incompatible with it, is simply a postulate of legislative practice. It is not a legal axiom. Although it appears desirable that the system of public and private laws established by statute shall not be in contradiction with the text of the constitution, the existence of such a contradiction is possible in fact and admissible in law, as a divergence between the penal, commercial, or civil code and a subsequent special law is possible.<sup>1</sup>

It followed from the Prussian constitutional conception that the part played by the elected representatives of the people in the enactment of laws and in the adoption of public policies was one quite different from that which is played in countries whose constitutional systems are founded upon a democratic basis. According to the doctrine almost, if not quite, unanimously held by German jurists, the people through their representatives participated not in the creation of law, but in the determination of the contents of a proposition which was to be submitted to the sovereign for the exercise of his supreme legislative will. And not until that will had been approvingly exer-

Power of  
elected  
representa-  
tives

<sup>1</sup>Quoted by Borgeaud, *Adoption and Amendment of Constitutions* (Eng. trans.), p. 68.

cised did the measure become legally executory (*Gesetz-befehl*).

In sum, then, the situation was this. The ruler, as a matter of grace and expediency, was pleased to learn the wishes of his people regarding a proposition of law or the adoption of a public policy, and to obtain such information regarding its wisdom as a representative chamber was able to provide; and these wishes and this information he necessarily took into consideration in determining the exercise of his own sovereign will. But never did he regard these factors as controlling in any affirmative sense. So long as the constitution which he had promulgated existed, he agreed not to act contrary to its provisions with regard to the matters that were therein specified. But never for a moment did the German ruler admit himself to be under a legal or even a moral obligation to give effect to an expression of the will of the representatives of the people of which he disapproved; nor, as has been said, did he admit that the constitution itself limited his will, except as a self-imposed limitation.

It is this relationship of the King to his popularly elected legislative chambers that interprets many features of German public life that have seemed strange to English and American observers. It explains in the first place the fact that it was considered a moral and wholly justifiable practice for the King and his personal advisers—"the Government," as they were called—not only to control, so far as they could, the elections of members to the representative body, but by rewards and other forms of political pressure, to influence the votes of the representatives after their election. It explains furthermore the policy of the "Government" in playing off one party or faction against another and thus through the *bloc* system of obtaining a majority vote in favor of action which the Government desired. It explains also the fact that hardly had the first steps been taken in Germany,

No obligation  
on  
Ruler

Control of  
elections  
by Govern-  
ment



before the War, to develop responsible parliamentary government, whether of the English or the French type. All of their publicists, indeed, recognized that such a system was absolutely incompatible with the German conception of monarchical power. It is true that irritation, at times intense in character, was felt and expressed against the assumption by the Emperor of the right to direct and control foreign affairs by his own personal acts and words; but this was the case, not because he was acting in derogation of the power of the representatives of the people or of a ministry which they supported, but because, as has already been suggested, under the Imperial Constitution, he was required to act through his Chancellor. He, in turn, was supposed to exercise his power in and through the *Bundesrath*, which body in turn represented the "Governments" of the several states of the Empire.<sup>1</sup> After the downfall of Bismarck, and especially after the retirement of his successor, Caprivi, the Emperor was accustomed to select as his Chancellor and President of the Prussian *Ministerium* men who were willing in very large measure to subordinate their own wills and judgment to that of their imperial master, and thus, in fact, the influence of the Emperor was very great, especially in foreign affairs.

Authority of  
Emperor

The monarchical conception in Germany explains, still further, the right which was exercised by the "Government," of dissolving the elected chamber whenever other methods of obtaining its support for a government measure had failed; and, it may be said, that so powerful was the official influence that could be exerted in the ensuing election that in all cases the result was that the newly chosen

Dissolution  
of elected  
chamber

<sup>1</sup>On the German imperial constitution, see Lowell, *Governments and Parties in Continental Europe*, Vol. I, Chap. V; Ogg, *The Governments of Europe*, (1st. ed.), p. 193 ff. (rev. ed., p. 608 ff); Krüger, *Government and Politics of the German Empire*; Howard, *The German Empire*; Burgess, "The German Emperor," *Political Science Quarterly*, June, 1888; Shepherd, "Tendencies Toward Ministerial Responsibility in Germany," *American Political Science Review*, February, 1911.

chamber was of the desired political complexion. Von Bülow, in his *Imperial Germany*, complained that the Germans lacked political ability, by which, as he explained, they had shown a disposition to form a multitude of minor parties based not on broad public principles but upon narrow, particularistic, and personal interests. It would seem, however, that this failure of two or more strong political parties to develop was due in no small measure to the attitude which the "Government" assumed toward all political parties. The one strong political party in German imperial politics—the Social Democrats—was strong in numbers rather than in influence, and, moreover, occupied a very particular position, for, as Von Bülow frankly says, it had, from the viewpoint of the "Government," no right to exist. He flatly stigmatized its members as enemies of the German State—enemies for the overthrow of whom any means, including force when possible, could rightfully be employed.<sup>1</sup> As to the reasons why the Social Democrats were held in such peculiar detestation by the "Government," it may be said, briefly, that it was not so much their legislative programme which was disapproved of as that their fundamental political doctrines were in conflict with the monarchical conception of the Empire and of Prussia. This is made abundantly clear by reading between the lines of Von Bülow's book.

Finally, it may be said that the monarchical conception in Germany explains the open and avowed measures which were taken by the ruling authorities to control the formation and expression of a popular opinion with regard to matters of public policy. Not only was there a strict control over unofficial expressions in the press, as the numerous prosecutions for *lèse majesté* testified, but, and more especially, governmentally inspired articles were constantly published in the leading newspapers in order that the

Social  
Democratic  
Party

Control of  
the Press

<sup>1</sup> These statements were discreetly omitted by the former Chancellor from the second edition of his work, issued after the beginning of the War.

people should be led to take a favorable view regarding public policies which were approved by the "Government."<sup>1</sup>

In order to make this point clear we may quote the words of Dr. Hasback taken from an essay entitled "The Essence of Democracy,"<sup>2</sup> in which he discussed the part which public opinion should play in the modern constitutional State. "Who forms public opinion?" he asks. "In a democracy and a parliamentary monarchy (such as exists in England) it is created exclusively by parties; in a constitutional monarchy (as known in the German states), on the other hand, by parties and government. For a full understanding of this important difference we first must clearly distinguish between parliamentary and constitutional monarchy. In parliamentary monarchy the influence of the monarch is as a matter of fact so far suppressed that here, too, the stronger party opinion determines the destiny of the country, while in the constitutional monarchy the prince as joint possessor of the legislative power, and as the possessor of the executive, exercises a considerable influence upon the formation of public opinion. The ministers nominated by him introduce bills into parliament; they defend them against the criticism of representatives whom they are compelled to face; the prince addresses messages to parliament; he can dissolve it and thereby take a position on definite questions; official newspapers defend the attitude of the government; party organs which approve the policy of the government support it or open their columns to it; the government seeks to influence representatives, etc."

"These are methods," Dr. Hasback continues, "some of which are also understood in America; in America the

Parliamentary and Constitutional Monarchy

Political Parties and Public Opinion

<sup>1</sup>See Brooks, "L'Èse Majesté," *The Bookman*, June, 1904.

<sup>2</sup>Published in the *American Political Science Review*, February, 1915. This article was called out by a review of his volume *Die Moderne Demokratie*, published in 1912.



President addresses messages to Congress; presidents and governors attempt to influence the legislative power; there are also newspapers which support the President and governors against the legislative assemblies if they consider the former's policies advantageous." This, it may be answered, is true, but the important fact to be observed is that in America the President and the governors of the states are themselves the leaders of their parties and are representatives of the people. The stronger public opinion which thus finds expression in state action is therefore a popular opinion and is not one which is largely determined by the judgment of persons who are not responsible to the people, and who only in a purely fictitious sense can be said to represent them.

In summary, then, we may ask: What was conceived to be the part which the elected representatives of the people could play in the operation of such a monarchical government? Their function was fourfold: (1) they constituted an avenue of information through which the "Government"—the King and his advisers—might learn of the economic and social conditions of the people, and of their desires; (2) they constituted an organ of advice—that is, the representatives, individually, or through their collective wisdom, gave what amounted to advice to those in authority; (3) they criticized the acts of the Government—brought its acts, or many of them at least, to the bar of public opinion; (4) they had a veto power over the matters enumerated in the Constitution. This veto they could exercise by refusing, by a majority vote, to approve legislative propositions laid before them by the King. But, even in this negative sense, it is to be observed that they could not, by refusing to approve the necessary appropriations, prevent the execution of any laws previously enacted. This last constitutional doctrine needs some explanation.

It is true that the Prussian Constitution declared that all income and expenditure should be estimated in advance

and included in a budget, annually adopted by a statute (Art. 99); and that "taxes and requisitions for the State's treasury may only be raised so far as they are included in the State's budget or provided for by special statute," (Art. 100); and that a substantially similar provision was contained in the Imperial Constitution (Art. 69). But, as is well known, during the four years from 1862 to 1866 the Prussian government was carried on in defiance of the legislature which had refused to vote the necessary appropriations, and this was defended as constitutionally permissible by the eminent jurist Rudolf von Gneist, whose views were later accepted by most of the public law writers of Germany.<sup>1</sup> This constitutional justification, as was pointed out by Prof. W. J. Shepard, in an able article,<sup>2</sup> was founded upon two distinctions which German jurists considered fundamental, namely, that between "law" and "ordinance," and that between "material" and "formal" acts of government. "Material" refers to the contents of a measure; and "formal" refers to its external or outward form. "A material law is an act of government which embodies some general norm or rule of conduct; a material ordinance is one which approves a general rule in a particular case, or provides the machinery for the application of the general norm. The formulation of material law is legislation; that of ordinances is administration."

"Laws"  
and "Or-  
dinances"

Applying these distinctions to the matter of appropriations, it was held that the budget was a law only in a formal sense; materially, that is, essentially, it was an ordinance. This was significant since it was held that a merely formal law could not repeal or render of no effect a material law. The refusal, therefore, to pass a budget could not render inoperative such material laws as were already upon the statute books. These could be repealed only by the joint

Methods of  
Executive  
Control

<sup>1</sup>Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 298.

<sup>2</sup>"The German Doctrine of the Budget," *American Political Science Review*, Vol. IV, p. 52 (February, 1910).

action of all the organs of government by which they were enacted, that is, by the two legislative chambers and the King. An attempt, therefore, upon the part of one or even of both of the legislative chambers to use its refusal to pass the budget in order to force certain policies upon the executive was not only a vain but a culpable act. If then, they did make the attempt, as in fact they did during the years 1862-1866, it was morally obligatory upon those in executive power to carry on the government, to continue to enforce the existing revenue laws, and to make the expenditures required for enforcing all other laws.

Legislative  
Power  
vested in  
King

All this reasoning was, of course, dependent upon the fundamental assumption, earlier mentioned, that the legislative body was not possessed of the decisive power in the State, but that this authority was vested in the King. It is true that the Prussian "Government" later obtained from the legislature an act of indemnity for its acts during the period 1862-1866, but by the "Government" this was interpreted as a concession upon the part of the legislature that the Government's acts had been justified, and not as an admission upon the part of the King and his ministers that they had done acts which needed to be retrospectively legalized. At any rate, the result was that as a constitutional as well as a political doctrine, it was held in Germany that the control of the legislature over the public purse was a qualified and not an absolute one.

Veto Power  
in Chambers

The function which the chambers performed in the creation of law was thus limited to the vetoing of propositions of new law of which they disapproved. And even as to the new laws which were approved by them, the constitutional theory was that the part played by the chambers was limited to a participation in the determination of the substance or material content of the law. That which gave legal life and force to this substance was the will of the King as manifested by his promulgation of the project in his name as law. And it does not need to be said that



the King was at all times free to refuse to promulgate propositions which had received the assent of the chambers.

An inspection of the Prussian Constitution shows that formally the powers of the King were very broad. In the opinion of an American commentator, they exceeded "those exercised by any other European sovereign. The King is the head of the army and the navy, and of the Church, and in him are vested, directly or indirectly, all functions of an executive or administrative character. All appointments to offices of State are made by him immediately or under his authority. The upper legislative chamber is recruited almost exclusively by royal nomination. And all measures, before they become law, require the King's consent, though, by reason of the sovereign's absolute control of the upper chamber, no measure of which he disapproves can ever be enacted by that body, so that there is never an occasion for the exercise of the formal veto."<sup>1</sup> And, in addition, it is to be remembered that the fundamental theory regarding the nature and source of the constitution was that the King was the residual claimant to all authority not vested in some other organ of government, and that where his powers were not expressly limited, they were absolute in character.

After all, however, the important point is as to the political responsibility under which the King exercised his constitutional powers. If, as in England, practice had firmly fixed the doctrine that they could be employed only at the direction of ministers who thereby assumed both legal and political responsibility for them, and if these ministers were permitted, as a practical proposition, to remain in office only so long as they were able to obtain the support of a majority of the members of a legislative body, freely elected by the people, then, from the standpoint of popular government, it would not have been improper or inex-

**Broad royal  
authority**

**Ministers  
not politically  
responsible**

<sup>1</sup>Ogg, *The Governments of Europe* (1st. ed.), p. 253.

Influence on  
legislative  
personnel

pedient for the Crown to possess very great powers. But when there did not exist this expectation that the King would be guided by the judgment of his ministers in the exercise of his constitutional powers; when there was no parliamentary responsibility on the part of the ministers; and when, in fact, the King was able to exercise a considerable or dominant influence in determining the membership of the legislative chambers, it was very significant that the royal powers were as great as those recognized in the Prussian Constitution.

The composition of the Upper Chamber of the Prussian legislature was fixed by a royal ordinance issued in pursuance of a legislative act of 1853. This act, in turn, was authorized by the constitutional provision that "the first chamber shall be formed by royal ordinance which can only be altered by a law to be issued with the approval of the chambers." (Article 68.)

Upper  
Chamber of  
Prussia

Without going into detail, it may be said that the *Herrenhaus*, as it was styled, was composed of princes of the royal family, members of families of Prussia that once were royal, and various other persons appointed by the King. The body, therefore, was absolutely controlled by him. Even if, by some curious chance, this body had sought to act contrary to his will, he would have been able to overcome its opposition by exercising his right to appoint for life an indefinite number of new members, subject only to the restriction that the appointees were at least thirty years of age. The members of the Lower House (*Abgeordnetenhaus*) were elected by the people, but in a manner that was far from democratic in character, and which, in fact, was so arranged as to give dominating control to the wealthier classes.

In the first place, though popular suffrage prevailed,<sup>1</sup> the ballots were publicly cast, with the result that there was full opportunity, which was never missed, to exert

<sup>1</sup>The voter had to be at least twenty-five years of age.

pressure upon the voter from above, that is, by his employer, or agents of the government.

Limitations  
on popular  
suffrage

Secondly, the voting districts were so arranged that those districts in which the Social Democrats were most numerous were grossly under-represented upon a population basis.

In the third place, the King had the power to dissolve the House whenever he saw fit—a power which he frequently exercised—and thus to necessitate a new election.<sup>1</sup> He could also order an adjournment but not for more than thirty days, and not more than once during the same session.

Fourthly, and finally, the elections were not direct, but indirect and according to a three-class system based upon wealth. This system, shortly stated, was as follows:

The members of the House were elected by “colleges” in each of the constituencies which, by a majority vote, elected the one, two, or three members to which the constituency was entitled. These “colleges” were elected by the voters as grouped into three classes, each class electing one third of the members of the electoral college of their respective constituency. The electoral districts were subdivided into a large number of small precincts in each of which one elector was chosen for each two hundred and fifty persons. In these precincts the voters were grouped into the three classes which have been mentioned, according to the amounts of taxes paid by them. The first class was composed of those voters who, individually, paid the most taxes and who together contributed one third of the total amount of taxes paid in the precinct. The second class was composed of those voters who, individually, paid the next largest taxes, which, together, constituted one third of the total. The third class was made up of the remaining voters. Each of these classes in each precinct was entitled to elect one third of the members

Three-Class  
system of  
voting

<sup>1</sup>“The power of dissolution is unlimited, and it has happened several times, when the elections have been unfavorable to the government, that the new *Landtag* has been dissolved before it met.” Lowell, *op. cit.*, Vol. I, p. 298.



of the electoral college for the constituency in which the precincts were.

Control by  
wealthy  
classes

The inevitable and intended result of this arrangement, of course, was that the first two classes, composed of very few voters, and all persons of comparative wealth, elected two thirds of the members of the colleges which chose the people's representatives in the Lower House. In more than two thousand of the districts the first class of the voters was composed of a single individual; and in some nineteen hundred other districts of only two individuals. Indeed, the estimate was made that 12 or 13 per cent. of the population elected two thirds of the representatives, thus having twice the voting power of the remaining 87 or 88 per cent. of the people. In result, then, even if the principle of parliamentary responsibility had been applied to the King's ministers, it would still have left the controlling power in the hands of the wealthy classes, whose interests and inclinations inclined them to support conservative as opposed to radical or Social Democratic policies. In fact, however, no provision for cabinet government of the responsible type was made. The King's ministers, appointed by him, were, as Lowell says, "the servants, not of the Chambers, but of the Crown, a fact that finds its outward expression in the frequency with which they refer to the personal opinions of the King. Nor are they subject to an elective control of any kind on the part of the legislature, for although the constitution provides that they can be prosecuted for bribery, treason, or violation of the constitution, upon a resolution passed by either House, there is no statute prescribing any penalties, and hence the provision is a dead letter."<sup>1</sup>

Nature of  
Prussian  
Cabinet

The ministers did not even act as a unit. There was a so-called Minister-President, but he had no real political control over his colleagues. Each minister was thus di-

<sup>1</sup>Lowell, *op. cit.*, Vol. I, p. 289. On the Prussian three-class system, see Ogg, *The Governments of Europe* (1st. ed.), p. 260; Munro, *The Government of European Cities*, p. 128.

rectly responsible to the King who appointed him, and who could at any time remove him from office. "He selects them," says Lowell, "for their administrative qualities rather than their political opinions, and requires of them administrative capacity and obedience to himself."<sup>1</sup>

Aware of its lack of controlling power, the Prussian *Landtag* was content, for the most part, to concern itself with the measures which were prepared and submitted to it by the King's ministers. And, as regards the administration of the laws that were enacted, its control was very slight. "It can appoint commissions to make investigations, but the Government can forbid the officials to give them any information, and in fact the ministers have insisted that such commissions, like all the committees of the *Landtag*, shall hold no direct communications with any officers but themselves. It can require the presence of the ministers and ask them questions, but they may answer or not as they please. It can address interpellations to the Government, but as the parliamentary system does not exist in Prussia, these have not the same importance as in France and Italy. Each chamber can also present addresses to the King, who may pay attention to them or not, as he thinks best. In short, the influence of the *Landtag* over the administration is confined to expressing an opinion which is not likely to have any great effect."<sup>2</sup>

Attention should be called, also, to the dominant influence which Prussia had in the Empire, for this gave greatly increased significance to the constitutional theory and practice of the Prussian Kingdom. Of primary importance with respect to Prussia's hegemony was the historical fact, fully appreciated by all Germans, that German unity and German national strength had been realized in very large measure through Prussian effort. Prussia not

Powers of  
*Landtag*

Influence  
of Prussia  
in Empire

<sup>1</sup>Lowell, *op. cit.*, Vol. I, p. 291.

<sup>2</sup>Lowell, *op. cit.*, Vol. I, p. 299.

only formed the purpose and supplied the leadership, but furnished the material means for bringing these results about. It was but natural then that the German people should continue to look to Prussia for political direction and political instruction.

**Its causes**

Added to this historical circumstance of leadership was the fact that Prussia had excelled the other German states in its industrial and commercial development, in the efficiency of its administrative organization and operation, in the growth of its institutions of learning and their productivity in the fields of natural science and its practical applications, and in its elaborate social legislation for the betterment of the living and working conditions of the laboring classes. All these materialistic, or, as the Germans said, realistic, results played a part in exalting Prussian influence throughout the German Empire. The fact that during recent years Prussia had lost her prestige in pure philosophy, and had never been distinguished in the æsthetic arts, was overborne by her more material successes.

**Population,  
territory,  
and power**

Still further, the dominance of Prussia was to be explained by her territorial size and number of population, which in both respects was greater than all the other states of the Empire combined. Out of a total area of slightly more than two hundred thousand square miles included within the Empire, approximately one hundred and thirty-five thousand were enclosed within the Prussian borders; and out of a total imperial population of, say, seventy millions, considerably more than forty millions were Prussian subjects.

Even if the German Empire had resembled the American Union in that no distinction was made between the constituent states as regards their right to participate in the control of the Imperial or Federal Government, the facts that have been mentioned would have been abundantly sufficient to give the leadership to Prussia. But the su-



periority thus made certain was further increased by the following special provisions of the Imperial Constitution:

1. Prussia's King was *ex officio* the German Emperor.  
 2. Prussia's vote in the *Bundesrath* was sufficient to prevent the adoption of any proposed amendment to the Imperial Constitution.

3. No army, navy or revenue measure could be enacted by the Imperial Parliament without the approval of the Prussian Government, if it operated to change the *status quo ante*.

4. To Prussia was given the presidency of all the committees in the Imperial *Bundesrath* with the exception of one, that on foreign relations, which was given to Bavaria. This committee, however, was never an important one, its function extending little beyond listening to communications made to it by the Chancellor.

5. Though not a constitutional discrimination in favor of Prussia, but as resulting from her size and population, Prussia possessed or controlled 17 votes in the *Bundesrath* out of a total of 61, and sent 235 representatives to the *Reichstag* out of a total of 397.<sup>1</sup>

Except in time of war, the constitutional powers of the Emperor were not great—many of the powers normally possessed by a constitutional monarch being vested not in him, but in the *Bundesrath* which acted as the collective organ of the "governments" of the federated states of the Empire. The members of the *Bundesrath* were constitutionally obligated to vote according to instructions given them by their respective governments. It was the dominant organ, in times of peace at least, in the German imperial system; and, inasmuch as the voice of the Prussian delegation was, in practice, controlling in the *Bundesrath*,

Methods by  
which con-  
trol was  
maintained

Constitu-  
tional  
powers of  
Emperor

<sup>1</sup>The Imperial Constitution gave Prussia seventeen votes in the *Bundesrath*. Three more were acquired by contract with Waldeck and a perpetual regency in Brunswick. The Alsace-Lorraine Constitution Act of 1911 allotted the territory three votes. These three votes were "instructed" by the Emperor. See Hazen, *The Government of Germany* (pamphlet issued by the Committee on Public Information—an excellent brief discussion).

His dual  
rôle

and this delegation was sent and controlled by the instructions of a government which was under the effective control of the King of Prussia and his advisers, it followed that the Emperor, exercising his powers as King of Prussia, was able to exert a powerful influence in the Imperial Government. To be sure, there was dissatisfaction in Germany, at times intense, because of utterances and activities of William II, but this was because he had acted outside the channels constitutionally provided. Instead of using his influence to control the *Bundesrath* either indirectly or through the Prussian delegation, in appearance at least, he gave utterance to personal opinions on matters of the gravest public importance without first subjecting them to the sobering consideration of his constitutional advisers, and giving at least an opportunity to the members of the *Bundesrath* to discuss them.<sup>1</sup>

*Reichstag*  
a debating  
society

In the Empire the popularly elected *Reichstag* did not have more influence in determining the policies of the Government or the manner of executing them than had the *Abgeordnetenhaus* in Prussia. Its members were indeed directly elected upon a practically manhood suffrage, and by secret ballot. But the arrangement of constituencies was such that the districts in which the Social Democrats had their greatest strength were grossly under-

<sup>1</sup>The qualifying phrase, "in appearance at least," is advisedly used since there is considerable ground for believing that in some of the instances in which the Kaiser appeared to speak or write wholly upon his own initiative, or even impulsively, it was with the approval of his constitutional adviser, the Chancellor, and that purely political reasons made it desirable that the Kaiser rather than the Imperial Government should appear as the author of the statements made. For example, the responsibility for the famous Kruger telegram of January 3, 1896, in which the Kaiser congratulated the President of the Transvaal on repelling the Jameson raid, was placed wholly upon the shoulders of the Kaiser, the truth not appearing until thirteen years later, when, in March, 1909, speaking to the *Reichstag*, Chancellor von Bülow said: "It has been asked, was this telegram an act of personal initiative or an act of State? In this regard let me refer you to your own proceedings. You will remember that the responsibility for this telegram was never repudiated by the directors of our political business at the time. The telegram was an act of State, the result of official consultations. It was in no wise an act of personal initiative on the part of His Majesty, the Kaiser. Whoever asserts that it was, is ignorant of what preceded it, and does His Majesty completely wrong." Shaw, *William of Germany*, p. 154.

represented, and no constitutional means were provided whereby its majority will could determine who the Chancellor should be. We say the Chancellor, rather than the Ministry, because in fact there was no imperial cabinet or ministry in the English or the French sense. The Chancellor was at the head of the government and the ministers who assisted him were his subordinates or servants and not his colleagues.

There can be no doubt that there was a strong demand in Germany that responsible parliamentary government be established. This was a reform urged by the Social Democrats whose number was constantly increasing. A politically responsible government, however, would have meant not simply a new parliamentary practice, but a radical alteration in the distribution of powers in the Imperial Government and, indeed, in the federal system upon which the Empire was founded. The power of the *Bundesrath*, the most powerful organ of the Imperial Government, the agent of the rulers or "governments" of the constituent states of the Empire, would have had to be transferred to the *Reichstag*, which, from a position of practical impotence, would thus have become the dominant organ in the Empire. Any shift to a parliamentary government, furthermore, would have meant a corresponding loss of prestige and influence by the *Bundesrath*, an equal diminution of the influence of the rulers of the constituent states in imperial affairs, and, in an especial degree, a modification of the status of the Emperor. For, as has been pointed out, the Emperor was powerful because he was also the King of Prussia and as such was able to control the Prussian delegation which dominated the *Bundesrath*. With this council obliged to play second fiddle to the *Reichstag*, the Emperor would have been without an organ through which he could exercise his personal control in imperial matters.

It was a sound instinct which led the Allies—particu-

Demand for  
Parliamen-  
ary Govern-  
ment

Factors  
opposing  
a change



The German  
Constitution  
an issue of  
the War

larly when they spoke through President Wilson—to stress the character of the German Government and to insist that there could be no guarantee against a similar outbreak in the future until the Constitution was democratized. Mr. Wilson's utterances are still too familiar to require much quotation. "A steadfast concert for peace can never be maintained except by a partnership of democratic nations. No autocratic government could be trusted within it or observe its covenants." He told the Pope that the object of this war "is to deliver the free peoples of the world from the menace and the actual power of a vast military establishment controlled by an irresponsible government" which is "the ruthless master of the German people." Peace would have to be based "upon the faith of all the peoples involved" and not "merely upon the word of an ambitious and intriguing government." As Mr. Balfour expressed it, Germany would have to be powerless or free.

"Reform"  
in Prussia

The few measures of "reform" announced by the "intriguing government" need not be described here. In April, 1917, the Kaiser issued an imperial rescript defining a "far-reaching change" which would mean "the liberation of our entire political life." This was the abolition of the class franchise in Prussia, with a few minor changes, but it had to be postponed "in the highest interests of the Fatherland, until the time of the homecoming of our warriors." Occasionally, as at the time of the Peace Resolution in July, 1917, it looked as if the *Reichstag* was becoming able to assert itself,<sup>1</sup> but the Von Kühlman crisis in June, 1918, showed that the military leaders were still in undisputed command.<sup>2</sup> The correspondence between President Wilson and the German Government in

<sup>1</sup>See Brailsford, "The Reichstag and Economic Peace," *The Fortnightly Review*, October, 1917.

<sup>2</sup>For excellent articles on the German Government during the War, see "A War of Liberation," *The Round Table*, June, 1917; "The Internal Problem in Germany," *ibid.*, September, 1917, and "The Unity of Civilization," *ibid.*, September, 1918. See also Ogg, *The Governments of Europe* (rev. ed.), Chap. XXXVIII.

October, immediately preceding the armistice, had much to say about the constitutional reforms which Germany was proposing, but they were more of a gesture than an honest attempt to institute a democratic régime. When reform did come, it was complete: monarchy gave way to a republican form of government with some markedly democratic features.<sup>1</sup>

The  
Constitution  
of the  
German  
Common-  
wealth

## II. THE CONSTITUTION OF JAPAN<sup>2</sup>

The government of Japan, as has already been said, resembles, in a number of important respects, the autocratic government of Prussia. It is one *for*, rather than *by* the people, but there was probably as much democracy allowed as could reasonably be expected at a time (1889) when the Japanese had had no experience in self-government. It is to be remarked, furthermore, that the menace of a military despotism lies not in political institutions, but in the policies which the control of the

Japan and  
Prussia

<sup>1</sup>For the text of the German Constitution see the translation by Munro and Holcombe, *League of Nations*, Vol. II, No. 6, December, 1919 (World Peace Foundation, 40 Mt. Vernon St., Boston). The events leading to its adoption are described in the introduction to this text. Of interest also is "The German Revolution," *International Conciliation*, April, 1919. The Constitution is discussed by Brunet, *La Constitution allemande du 1 août 1919* (Paris, 1920); W. H. Dawson, "The Constitution of New Germany," *Fortnightly Review*, March, 1919; Young, *The New Germany* (N. Y., 1920); Bevan, "Germany Tries Democracy," *Contemporary Review*, April, 1919; Freund, "The New German Constitution," *Political Science Quarterly*, June, 1920; Shepherd, "The New German Constitution," *American Political Science Review*, February, 1920; Saunders, "The Constitution of the German Empire," *The New Europe*, October 9, 1919; Young, "The German Constitution," *The International Review*, December, 1919; Ogg, *The Governments of Europe* (rev. ed.), p. 717. Prussia also adopted a new constitution (April, 1920). Every citizen over 20 years of age can vote, Parliament is elected for four years, and the Ministry is invested with the powers of the former King.

<sup>2</sup>For discussions of the government of Japan, in addition to the works referred to below, see Clement, *Constitutional Government of Japan*, and *Constitutional Imperialism in Japan* (American Academy of Political Science, 1903 and 1916); Griffis, *Mikado: Institution and Person; A Study of the Internal Political Forces of Japan*; McLaren, *A Political History of Japan During the Meiji Era* (1867-1912), and "Political Development of Japan," *Transactions of the Asiatic Society of Japan*, Vol. XLIII, pt. ii, p. 782 (November, 1914).

A very excellent description is to be found in Professor McLaren's three articles, "Present Day Government in Japan," *Asia*, March, April, and May, 1919. For the text of the Japanese Constitution, see below, Appendix, p. 527.

military class permits to be pursued. This latter question is outside the present discussion.<sup>1</sup>

When the American Constitution was framed, Montesquieu, the colonial governments, and the English system furnished the theories and the models to be followed. For Japan, Bismarck was the oracle and the Prussian and Imperial constitutions were the models. Ito, afterward Prince Ito, was sent to Europe to study existing institutions, and it was natural that he should find that the Teutonic constitutions more nearly suited the purposes of the Japanese. This was to some extent inevitable. The British Constitution, since it was unwritten, could not be copied, and in any event it would have given too much responsible government. The theories of Belgium, Holland, and Italy were impossible for the same reason; and Austria could throw no light on Japanese problems. Hence Prussia served as the model.<sup>2</sup>

In broad outline, the Constitution provided that the seat of authority was to be in the Emperor. The executive work was to be done by the cabinet and subordinate bureaucracy. The legislature was bicameral with the Upper House composed of peers, representatives of the largest tax-payers, and appointees of the Crown, while the Lower House represented the tax-paying population. The fundamental law, with seven chapters and seventy-six articles, is very general, and a large number of important questions of detail are left to be settled by administrative codes.

<sup>1</sup>See, *inter alia*, Blakeslee (editor), *Japan and Japanese American Relations* (Clark University Addresses); Kawakami, *Japan and World Peace*; Pooley, *Japan at the Cross Roads*.

<sup>2</sup>"That Germany should serve as a model should cause no surprise. Temperamentally the Teutons and the Japanese had and have much in common. Nationalism, imperialism, militarism, formalism, a respect for codes, for system, for organization, for efficiency, were and are common characteristics, while points of more immediate interest in the choosing of a Constitution pointed no less unmistakably to Germany." McGovern, *Modern Japan*, p. 99. Uyebara (*The Political Development of Japan*, p. 118) says that "the constitution was drawn up in a reactionary atmosphere, with the utmost secrecy, and in an impenetrable department of the Imperial government, free from popular agitation and all contact with public opinion."

Responsible  
government  
not desired

Constitution  
in very  
general  
terms



Of the seventeen articles in the first chapter of the Constitution, only one, the first, as Professor McLaren points out, is of native origin. Article 8 is copied from Article 14 of the Austrian law concerning imperial representation,<sup>1</sup> and the others come from Chapter III of the Prussian Constitution. The powers of the Emperor are vast; "legally the Japanese sovereign is as autocratic as was the King of Prussia under the old régime", but he exercises his authority through his Ministers who are provided for by a single article (Art. 55). Their powers are made more definite by ordinances. On this brief constitutional provision and the subsequent ordinances is based the bureaucratic control which is one of the fundamental features of the Japanese political system.

Only one  
article of  
native  
origin

The matter is rendered even more complicated by the fact that Prince Ito had no intention of introducing the system of unified Cabinet control, as we now understand it, and which is now in force. Trained in the school of Bismarck, who was equally impatient of "committee government," as he termed it, and who insisted that a single official—the Imperial Chancellor—be the keystone of the Executive arch, Ito was desirous of introducing some similar scheme into the Japanese Constitution, and though by the omission of all details relative to the appointment, dismissal, responsibility, and mutual relationships of the Ministers of State from the Constitution he thus allowed these questions to work themselves out as the result of practical experience, he nevertheless ordained that the various Ministers should be individually and not collectively responsible for their official actions. Furthermore, though he instituted the Cabinet, it is obvious that he desired that the Ministers should, at best, be under the Minister President's (Premier's) direct control, as in the German prototype.

No Cabinet  
Responsi-  
bility

<sup>1</sup>"Art. 14. If urgent circumstances should render necessary some measure constitutionally requiring the consent of the *Reichsrath* when that body is not in session, such measure may be taken by imperial ordinance, issued under the collective responsibility of the ministry, provided it makes no alteration of the fundamental law, imposes no lasting burden upon the public treasury, and alienates none of the domain of the State. Such ordinances shall have provisionally the force of law, if they are signed by all of the ministers, and shall be published with an express reference to this provision of the fundamental law." Wright, *The Constitutions of the States at War*, p. 18. There are some important differences between this provision and the corresponding one of the Japanese Constitution. See below, p. 528.

Events falsified both his expectations and his hopes. The group spirit—so very prominent in Japanese national psychology—ordained that the policy of the State should be framed by the Cabinet as a whole, and not by the Premier alone, and, except in rare instances, the Cabinet as a whole has felt it necessary to assume the responsibility for the actions of any of its members, more or less as is the case in England.<sup>1</sup>

Source of  
political  
authority

From these constitutional provisions, however, it is impossible to get a clear idea as to the real source of political authority in Japan. Nor is the Privy Council (Art. 56) of great importance; its functions are largely deliberative. The real source is found in an extra-constitutional body, the *Genrō* or Elder Statesmen. "We have," remarks a recent Japanese writer, "the extraordinary spectacle of a purely political entity, the most powerful in the State, which has nevertheless no place whatever in the national constitution. Search the voluminous body of the Japanese fundamental law, and you will nowhere find mention of the Elder Statesmen. This very fact has doubled the power of the *Genrō*, for it has left them legally responsible to no one. This state of affairs is certainly inconsistent with any theory of constitutional government."<sup>2</sup> The power of the *Genrō* is derived from their relations with the Emperor. They are summoned by him in every constitutional crisis; the country looks to this body rather than to their constitutional executive; the Prime Minister is chosen by the Emperor on their advice.<sup>3</sup> Until 1900 they

Influence  
of *Genrō*

<sup>1</sup> McGovern, *Modern Japan*, p. 107. McLaren inclines to the view that "responsibility to the Emperor is not accepted by the cabinet as a group but by ministers of state as individuals." *Asia*, March, 1919, p. 235. There was some doubt as to the person or body to whom the cabinet was accountable and this was not cleared up until Count Ito's definite statement that the cabinet was responsible only to the Emperor. *Commentaries on the Constitution*, p. 90.

<sup>2</sup> Iwasaki, *The Working Forces in Japanese Politics*, p. 32 (Columbia University Studies, 1921). See also, McGovern, *Modern Japan*, p. 69.

<sup>3</sup> "Likewise in the determination of Japan's foreign policy, the *Genrō* in the past have been of paramount importance. Under their wise and courageous diplomatic guidance, Japan has passed victoriously through three great wars. The *Genrō* planned a deadly blow which humbled China and won Japan a place among the nations, and they engineered the Russo-Japanese War and Japan's part in the World War, which have made their nation a first-class military power and a prime factor in world politics." Iwasaki, *op. cit.*, p. 35.

always chose one of their number, and until the accession of Mr. Hara, the Premier had always been a nobleman.

Whether the sovereign is actually responsible for the meetings of the Elder Statesmen, and if so, whether the act of calling them together is a public act for which some member of the cabinet is responsible, it is not possible to speak with certainty. In the majority of cases it would be safe to assume that some cabinet minister countersigns the imperial order; furthermore, on more than one occasion the cabinet has deliberated with the *Genrô*, or at least has submitted its proposals to the Elder Statesmen for their approval. . . . One of the earliest acts of the reigning sovereign was to appoint by Imperial order two ex-premiers to membership in the *Genrô*, and a few years later to call a third. There seems to be little ground for supposing that the Elder Statesmen's council as an institution will pass away with the death of its present members, or that its ranks will fail to be recruited by Imperial order from among the political and military leaders of the nation.<sup>1</sup>

Choice of  
Premier

The only political body which can rival the *Genrô* is the Advisory Council on Foreign Affairs, created in the third year of the War by Imperial Edict. It is under the direct control of the Emperor, and includes no one below the rank of minister of state. The Premier, present and former ministers of foreign affairs, and influential members of the Privy Council and of the Peers belong to it, together with the party leaders. "Like the council of *Genrô* this body is extra-constitutional. Its functions are broad and vague and its power is great. In time, perhaps, it will supplant the council of Elder Statesmen as the paramount political body of the nation."<sup>2</sup>

Advisory  
Council on  
Foreign  
Affairs

In addition to this executive organization, there is a legislature, the Imperial Diet, but as has been said, it does not possess the right to hold the Ministry responsible and is without adequate power over substantive legislation<sup>3</sup>.

Imperial  
Diet

<sup>1</sup> McLaren, *op. cit.*, p. 236.

<sup>2</sup> Iwasaki, *op. cit.*, p. 34.

<sup>3</sup> "Nevertheless, though the powers of the Diet are imperfect for democratic control, the members of the House of Representatives have not been without considerable influence in the counsels of the government, for by criticism and



Success of  
Bicameral  
Legislature

The Parliament has several interesting features. Its second chamber seems to have been very successful—although writers on the Constitution do not hesitate to call it reactionary—but the simple statement in the Constitution has been amplified by Imperial ordinances. One of these provides that the House of Peers shall be composed as follows:

The House  
of Peers

First, princes of the blood; second, the princes and marquises, all of whom shall sit by virtue of their rank when they have reached the age of twenty-five; third, counts, viscounts, and barons above the age of twenty-five who have been elected by the members of their respective orders, and whose number must not exceed one fifth of each order; fourth, persons above the age of thirty who have been nominated members by the Emperor for meritorious service to the State or for erudition; fifth, representatives of the fifteen highest tax-payers in each prefecture, to be nominated by the Emperor. The term of office of members of the third and fifth classes is seven years; of members of the first, second, and fourth classes, life.

The number of the non-titled members, consisting of persons directly nominated by the Emperor or nominated to represent prefectures shall not exceed the aggregate strength of the titled members.<sup>1</sup>

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obstruction in the house and by actual violence and demonstrations in its precincts, the political parties have contrived to obtain some recognition of their claims to office in the government, and occasional adoption of their policies.

"Twice within the last five years the cabinet offices, with the exception of the army and navy posts, have been filled by party politicians. Last year the office of prime minister, for the first time during the constitutional era, was bestowed upon a commoner. Significant as are these departures from the strict rules of bureaucratic succession to office in the government, it would be easy to over-emphasize their importance. . . . There is a trend to democracy manifested by the event [the appointment of Mr. Hara], but the goal is still a long way off. Moreover, that goal, democratic control of the policy of the state, is not to be reached directly along the present lines of progress. The Japanese cabinet is now as democratic as it can be under the existing rules and customs of the constitution; party men hold all the offices that are open to them, and yet they do not control the government. Before the goal of democratic control is reached, fundamental changes in the laws and customs of the constitution must be made." McLaren, "Present Day Government in Japan," *Asia*, April, 1919, p. 368.

<sup>1</sup>Imperial Ordinance (Organization of the House of Peers) No. 11, 1889, amended by Imp. Ord. No. 58, 1905; No. 92, 1909, Art. 1-7, quoted by Iwasaki, *The Working Forces in Japanese Politics*, p. 44. In 1917 the Upper House contained 215 peers, 119 imperial nominees, and 44 representatives of the highest taxpayers.

From this outline of the organization of the Upper House, it is evident that it will be generally willing to combine with the cabinet against the more popular chamber. "To the majority of the peers the very existence of the parties is a threat against the established order and the Constitution; hence any ministry which will spurn the party men is sure of the support of the peers. It is this fundamental cause of hostility between the two houses of the Japanese Diet that explains the success of bureaucratic cabinets in conducting the affairs of state in the face of a hostile majority of the Lower House. Contrariwise, the inherent distrust of the party politicians entertained by the majority of the peers accounts for the small success of the so-called party cabinets, even when they are supported by a majority of the representatives of the people. It is not intended to imply that Japan is the only country in which there is friction between the two houses of the legislature, for in fact there is no bicameral legislative body in the world in which the members of the two chambers think as one on all questions. But in Japan, to almost as great a degree as in Germany and Austria before the war, the meagre powers of the representatives are nullified by the opposition of the aristocratic elements in the Upper House to everything that savors of popular government."

Methods of  
aristocratic  
control

The House of Representatives is elected by the tax-paying population. Those qualified to vote must be at least twenty-five years of age and must pay direct taxes to the amount of at least ten *yen* a year. There are also provisions in the election law disqualifying incompetents, bankrupts, men in the army and navy, and students. In 1913 out of 13,000,000 males who could qualify so far as the age requirement was concerned, only 1,500,000 were on the voting lists, and on the basis of the whole population, there is one voter to

Limitations  
on Suffrage

<sup>1</sup> McLaren, *op. cit.*, p. 370.

**Dissolution  
of Lower  
House**

thirty-six persons.<sup>1</sup> The term is four years, but the Lower House is liable at any moment to dissolution by the Emperor. Without special permission from the government, the Diet may not be in session longer than three months,<sup>2</sup> and the practice has grown up (abandoned by the Okuma administration 1914-1916, but subsequently returned to) of assembling the houses late in December, completing their organization, hearing and replying to the speech from the Throne, and then adjourning for the New Year holidays. This device cuts about a month from the session. The cabinet may prorogue either house for fifteen days, and this, if a warning that continued recalcitrance will be followed by a dissolution, may be sufficient to persuade the members that submission is to be preferred to the uncertainty and expense of an appeal to the people. Plenary sittings of the house occur on alternate days only (committees sitting the other days) and, on an average, since its institution in 1890, the Lower House has sat 25 days a session, for an average of 3 hours and 8 minutes a sitting.<sup>3</sup>

**Limited  
authority of  
Legislature**

The powers of the legislature are limited. "The Emperor exercises the legislative power with the consent of the Imperial Diet" (Cons., Art. 5) and, as has been seen, the ordinance-making power need not wait for legislative approval, and there are methods of forcing the "consent" which is formally necessary. Interpellation—ministers appear in both chambers—is of scant value without cabi-

<sup>1</sup>Professor McLaren points out that, just as was the case in Prussia, the industrial centers are not allowed representation proportionate to their strength. "Thus Osaka with 1,400,000 population, sends six members to the Diet, while Kochi with just less than 40,000 sends one representative and Yamanashi prefecture with a population of 619,000 elects five members. Putting these figures in another way: the industrial population of Osaka, the greatest manufacturing city in Japan, sends one member to the lower house for every 233,333 inhabitants, Yamanashi, one for 123,800 and Kochi, one for every 40,000." McLaren, *op. cit.*, p. 370. For the disfranchisement of Berlin, see Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 252.

<sup>2</sup>Cf. the provisions in American state constitutions limiting the length of time the legislatures may remain in session.

<sup>3</sup>*Japan Year Book*, 1916, p. 646, quoted by McLaren, *op. cit.*, p. 373.



net responsibility and with the Emperor possessing the power of dissolution. Members of either house may introduce laws, but the great bulk of the proposals which are approved are introduced by the cabinet.

When we consider the control of the purse, the *raison d'être* of the House of Commons and a power which is the peculiar prerogative of the more popularly elected chamber in a bicameral system, the legislative impotence of the Imperial Diet is even more manifest. The Japanese Constitution does provide that the budget must first be laid before the House of Representatives (Art. 65), but if anything was thus given it was taken away by the same hand in a following provision (Art. 67) that "those expenditures already fixed and based upon the powers belonging to the Emperor by the Constitution, and such expenditures as may have arisen by the effect of law, or that relate to the legal obligations of the government, shall neither be rejected nor reduced by the Imperial Diet without the concurrence of the government." If the Diet is recalcitrant as regards new expenditures, or ones not covered by the exceptions just quoted, and refuses to grant funds, the government can carry out the budget of the preceding year (Art. 71).<sup>1</sup> Thus, as Professor McLaren remarks, "the Diet's feeble grip on the public purse is sufficient only to enable it to prevent the government from undertaking some new project which involves the expenditure of large sums of public money. Even this power it is usually able to exercise only for a short period, especially if the proposed increase of expenditures is connected with projects of national defense."<sup>2</sup> With regard to other legislative proposals, the Diet has sometimes rejected measures and even more frequently has been able to wring some concessions from the cabinet as the price for its approval. But the

Control of  
the Purse

Impotence  
of the Diet

<sup>1</sup>All the provisions of the Constitution regarding finance (Chapter VI) are interesting and deserve study, particularly with respect to taxation.

<sup>2</sup>*Op. cit.*, p. 371.

situation is very far from being one in which there is even a scant measure of popular control.

Individual  
Rights

Two other features of the Constitution merit brief consideration. The second chapter deals with the rights of subjects, but there is little if any protection of the citizen against the government. Comparison with guarantees like those in the American Constitution shows that the rights enumerated by the Japanese instrument are frequently qualified. Thus, liberty of abode and freedom from search are assured, "except as provided by law"; freedom of religious belief is limited by the "duties" of the subject; freedom of speech and of the press are only "within the limits of law"; and there is the general exception of a state of siege and emergency powers.

The  
Judiciary

With reference to the judiciary but little needs to be said. The system was in large measure borrowed from Prussia, but the legal ideas came partly from France. The Japanese penal laws, for example, are much on the model of the Code of Napoleon. American influence is seen in the appellate tribunals, but the system of administrative courts (Art. 61) conforms to continental, as opposed to Anglo-Saxon practice. "In Japan the conception that the Government may be involved in a legal dispute on equal terms with a commoner is essentially repugnant to the native mind, and, as in France, special courts have been instituted to consider all cases which arise from claims against the Administration or any representative thereof acting in his official capacity. Needless to say, in these courts, the Administration is itself very strongly represented."<sup>1</sup>

Political  
Parties

In conclusion, we may quote again from Professor McLaren. "No cabinet," he says, "not even a reactionary bureaucratic cabinet, now disdains wholly the support of political parties. Further, the practice of admitting the party leaders to the cabinet has hardened into a cus-

<sup>1</sup> McGovern, *Modern Japan*, p. 113. See above, p. 195, and below, p. 397 ff.

tom. Too much importance, though, should not be attached to such a tradition, for in the first place Japan is peculiarly liable to reactionary movements in politics, and in the second, the executive still holds in its hands complete power over the cabinet, as an administrative organ, through the rules of the Privy Council regulating appointments to the army and navy posts in the Ministry<sup>1</sup> and by reason of the fifty-fifth article of the Constitution. Some importance must be attached to the fact that the Diet, even though its legal powers are slight, has managed to compel almost every cabinet during the last twenty years to take public opinion into consideration. The methods adopted to achieve such an end have been reprehensible in the extreme at times, as for example in 1913, when the Seiyukai and its allies incited a great mob in Tokyo to acts of violence upon the persons of the government's supporters and then and there actually frightened the Katsura cabinet out of office. Moreover, with the spread of popular education, especially in the capital, the Lower House has found increasing support among the masses, and this growing weight of public opinion has impressed the government, for even an oligarchy must make shift to rule in a fashion not too unsatisfactory to the people.

Cabinets  
and Public  
Opinion

“But to achieve democratic control of the State is a goal out of the reach of the Japanese until new lines of endeavor are adopted. Constitutional reform must be accomplished. So long as all the parties put maintenance of the Constitution at the head of their statements of principles, projects for the amendment of the fundamental law are out of the question as practical political measures. Without new constitutional provisions the Diet cannot obtain substantive powers in legislation, and it cannot enforce responsibility upon the cabinet. The rules of the Privy

The road to  
Democracy

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<sup>1</sup>These ordinances require that the army and navy portfolios in the Cabinet shall be held by officials upon the active lists of the army and navy and thus make it impossible for a minority to remain in power which has not the support of the military and naval authorities.



Council must likewise be amended so that the ministerial posts of the army and navy may be on the same footing as the others. To support such a series of changes the franchise must be greatly extended so as to include all adult males. The old lines of progress toward democracy have been followed as far as they lead, but the journey is by no means ended. New lines must now be constructed."<sup>1</sup>

#### TOPICS FOR FURTHER INVESTIGATION

The Japanese and Austrian Constitutions.—Ogg, *The Governments of Europe* (1st ed.); Lowell, *Governments and Parties in Continental Europe*; and the Japanese Constitution, below, p. 527.

Electoral Reform in Prussia.—For references, see above, p. 374.

The New German Constitution.—For references, see above, p. 375.

The Powers of the King of Prussia and the Emperor of Japan.—Lowell, *Governments and Parties in Continental Europe*; Kruger, *Government and Politics of Germany*; McGovern, *Modern Japan*; and references above, pp. 352, 375.

The German Government and the War Aims of the Allies.—Scott, *President Wilson's Messages and State Papers*; and references above, p. 373.

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<sup>1</sup> McLaren, *op. cit.*, p. 375. For a discussion of how these constitutional arrangements work with respect to Japan's policy as a world power, see Professor McLaren's concluding paper, *Asia*, May, 1919, p. 475. On political parties, the best discussion is Iwasaki, *The Working Forces in Japanese Politics*, Chap. VII, and of interest also is Clement, "The Political Parties in Japan," *Political Science Quarterly*, Vol. XXVII, p. 669 (December, 1912).

## CHAPTER XXI

### THE JUDICIAL FUNCTION

THE executive and legislative functions of government, though differing from each other in their essential characters, are nevertheless so related that it is impracticable, if not impossible, wholly to separate them in their exercise. To the extent that they are separated, it is necessary that harmonious working relations be maintained if the government is to be an efficient one. Politics and policies are the life of these two functions.

When, however, we turn to the judicial function of government<sup>1</sup>—that is, to the function of determining in specific cases the rights and obligations established by law—we find ourselves, as it were, in a wholly different atmosphere. Here policies of state are, or should be, as far as possible excluded; the discretionary element reduced to a minimum, and the judicial organs, in their practical working, rendered as independent as possible of the executive and legislative branches of government.<sup>2</sup> It is true that, when required, the courts should be able to obtain the willing assistance of the executive arm for their protection and for the enforcement of their orders, and the legislature must supply them with the laws which they are

Independence of  
Judicial  
Function

<sup>1</sup>On the judicial power generally, see Garner, *Introduction to Political Science*, Chap. XVII; Baldwin, *The American Judiciary*; Sidgwick, *Elements of Politics*, Chap. XXIV; Lowell, *Government of England*, Vol. II, p. 439 ff; Bryce, *Modern Democracies*, Vol. II, Chap. LXII; Dicey, *Law of the Constitution*, p. 179 ff and *Law and Opinion in England*, p. 361 ff.

<sup>2</sup>"Whatever is supreme in a state, it ought to have, as much as possible, its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it. It ought to give security to its justice against its power. It ought to make its judicature, as it were, something exterior to the state." Burke, *Reflections on the French Revolution*.

to interpret, and provide them with the funds needed by them for their efficient operation. But it is of the essence of constitutional government that the executive should not attempt to influence or control the judgments of the courts, nor should the legislature deny to them powers adequate for the efficient performance of the tasks entrusted to them.

Recognized  
by all Gov-  
ernments

The above-stated principles are recognized under all forms of constitutional government, and it thus results that, while there is exhibited in the governments of the world the greatest variety of working relations between the executive and legislative branches, there are found but few fundamental respects in which States differ as regards the relations maintained between the judicial and the other two branches of their governments. In the pages that immediately follow, the two most important of these differences will be discussed. These relate to the question whether the courts shall be conceded the power to hold invalid, and therefore refuse enforcement to, acts of the legislature which, in their judgment, are repugnant to provisions of the written constitution; and, secondly, whether the validity of official acts of executive and administrative agents shall be tested in the ordinary courts of law or determined only by special tribunals known as administrative courts.

American  
Doctrine  
of Judicial  
Supremacy

Elsewhere in this volume attention has been called to the fact that it is a fundamental principle of American constitutional jurisprudence that the courts shall refuse to recognize the validity of acts of the legislature which are not warranted by the provisions of the written constitution under which the government is organized. This power is based upon the theory that all political authority finds its original source in the general will of the people, and that in the written constitutions which they have adopted they have given direct expression to their sovereign will as regards what organs of government shall exist and what



shall be their authentic powers.<sup>1</sup> It follows from this that the courts derive their being and jurisdictions from the same source as that whence the executive and legislative branches derive their existence and powers. All three branches are obligated to respect the expressions of will which the people have embodied in their fundamental instrument of government. In this sense the three branches are upon a plane of equality. But, by the very nature of their function, it falls to the courts to give the final interpretation to the laws of the land, first and foremost among which is the Constitution itself. In this sense, then, the judiciary of the United States, and especially the Supreme Court, which sits at Washington and is the tribunal of last resort with regard to constitutional questions, is raised above the other branches of the government: its interpretation and not that of the legislature or of the executive is the final and authoritative one.

Judicial  
interpreta-  
tion final

But this judicial supremacy is balanced by special powers which the legislature and the executive respectively possess. To the legislature belongs the tremendously important function of determining the policies of the whole government within the very broad limits of legislative action outlined by the Constitution. Into this field the courts have no right to intrude. They are concerned only with its boundaries. Thus into the justice or expediency of a legislative act they have no right to inquire. Theirs is only the function to determine whether or not the legislature has stepped outside the borders of its constitutionally defined competence. For example, if Congress passes an act in exercise, as it asserts, of its right to regulate commerce among the states, the courts may examine whether

Function of  
the Legisla-  
ture

<sup>1</sup>"The instruments which we call constitutions are among the greatest contributions ever made to politics as a practical art; and they are also the most complete and definite concrete expressions ever given to the fundamental principles of democracy." They are "a recognition of the truth that majorities are not always right, and need to be protected against themselves by being obliged to recur, at moments of haste or excitement, to maxims they had adopted at times of cool reflection." Bryce, *Modern Democracies*, Vol. II, pp. 10-11.

or not the regulation is one that relates to commerce among the states, and, if it does, whether it conforms to other general provisions of the Constitution. This determination is arrived at by giving an interpretation or construction to the phrase "commerce among the states" as employed in the Constitution or to other clauses in that instrument which may be deemed to apply to the law in question. But with regard to the expediency of the regulation which Congress may have established, the courts properly have nothing to say.

The  
Executive

So, similarly, with the executive. To the President has been given by the Constitution a number of important powers—to act as commander-in-chief of the army and navy, to grant pardons, to make appointments, to negotiate treaties, etc. All these are matters concerning which there is opportunity for the exercise of a wide discretionary judgment which is to be exercised by the President free from any judicial control. Only when the President attempts to exercise a power which is not granted to him by the Constitution are the courts empowered to intervene.

Power of  
Congress  
over Courts

Furthermore, as balancing the power of American courts to give final judgment as to the interpretation of the Constitution is the fact that these courts must look to the legislature for the appropriation of moneys needed for their operation, and to the executive for the power, in the last resort, to secure an enforcement of their judgments and decrees. Indeed, under the American system, the federal courts owe their actual existence and—with the exception of the original jurisdiction of the Supreme Court—their jurisdiction to Congress, for the Constitution simply provides that there shall be a Supreme Court and such inferior courts as Congress may from time to time ordain and establish, and that the Supreme Court shall have original jurisdiction with respect to certain specified matters, its appellate jurisdiction being left subject to such conditions as Congress may see fit to provide. Thus the

Supreme Court itself could not come into actual existence until Congress had passed an act constituting it, determining the number of its justices, their compensation, etc. The lower federal courts are all of statutory creation with their several jurisdictions determined by acts of Congress.

There is one possible qualification which needs to be made to the statement that, according to American constitutional jurisprudence, the courts do not concern themselves with the wisdom or expediency of executive or legislative acts. By the Fifth Amendment to the Federal Constitution the prohibition is addressed to the National Government that it shall not deprive any one of life, liberty, or property without due process of law; and by the Fourteenth Amendment a similar injunction is laid upon the governments of the individual states of the Union, together with the further provision that they shall not deny to any one the equal protection of their laws. Furthermore, most of the constitutions of the states specifically direct that no one shall be denied these rights.

Now the phrase "due process of law" has been interpreted by the courts to refer not merely to matters of judicial procedure—the giving to individuals of opportunity for a fair determination of their personal and property rights, or, as it is sometimes termed, their day in court—but to matters of substance as well. And thus the courts have assumed and constantly exercised the right to refuse to recognize the validity of laws which, in their opinion, are so arbitrary or unjust as unduly to deprive the individual of his life, liberty, or property, even though the procedure by which this deprivation is effected may be beyond criticism. The result has been that, whatever may be the theory, American courts do in fact often determine the validity of legislative acts, not purely from the standpoint of the general law-making powers vested in Congress or in the state legislatures, but from the

The Courts  
and public  
policy

Due Process  
of Law



Recall of  
Judicial  
Decisions

standpoint of their conception of justice or expediency.<sup>1</sup> And this practice upon the part of the courts has furnished a certain amount of justification for the demand which has by some reformers been made, that to the electorates, acting at the polls, should be given the right to "recall" judges whose judgments are not approved by them,<sup>2</sup> or by similar popular votes to reverse the decisions which are deemed objectionable.<sup>3</sup>

There are some written constitutions other than the American which provide, or have been interpreted to provide, for a judicial veto of legislative acts deemed inconsistent with constitutional provisions; but in no other country than the United States has this power been, in fact, freely exercised by the courts. In Germany, France, Switzerland, Belgium, Italy, and Austria-Hungary, all of them operating under written constitutions, the validity of legislative acts cannot be judicially questioned. The result, of course, is that the legislatures are the final judges of their own constitutional powers, the restraining force of the constitutions becoming a merely moral one.<sup>4</sup>

Competence  
of European  
Legisla-  
tures

<sup>1</sup>For a discussion of the Supreme Court and considerations of common sense, see Powell, "The Logic and Rhetoric of Constitutional Law," *Journal of Philosophy, Psychology, and Scientific Methods*, November 21, 1918; Kales, "Due Process, the Inarticulate Major Premise and the Adamson Act," *Yale Law Journal*, May, 1917, and "New Methods in Due Process Cases," *American Political Science Review*, May, 1918.

"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories; institutions of public policy, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Holmes, *The Common Law*, p. 1. See Frankfurter, "Constitutional Opinions of Justice Holmes," *Harvard Law Review*, Vol. XXIX, p. 683 (1916).

<sup>2</sup>The recall of public officers was first adopted by Oregon in 1908. Six states now provide for the recall of judges. See Dodd, *Constitutional Convention Bulletins*, p. 120 (Illinois, 1920); Lowell, *Public Opinion and Popular Government*, p. 147.

<sup>3</sup>Colorado is the only state which provides for the recall of judicial decisions and there has been little interest in it since 1912. On the recall of judicial decisions, see Roe, *Our Judicial Oligarchy*; Ransom, *Majority Rule and the Judiciary*; Dodd, "The Recall and the Political Responsibility of Judges," *Michigan Law Review*, Vol. X, p. 7 (1911); Roosevelt, *The New Nationalism*; Duncan Clark, *The Progressive Movement*; Dewitt, *The Progressive Movement*; D. F. Wilcox, *Government by All the People*.

<sup>4</sup>The new German Constitution gives to the Supreme Court the right to decide questions arising between the Federation and the States within it, but not ques-

This European principle of constitutional interpretation seems so strange to American minds that by many it is thought to be logically inconsistent with the very idea of a written constitution. Such indeed was the statement made by Chief Justice Marshall in the famous case of *Marbury v. Madison*,<sup>1</sup> decided in 1803, which fixed in American jurisprudence the doctrine that legislative acts repugnant to constitutional provisions are null and void. If, however, we consider the European principle more carefully, it is found that not only is there much to be said for it from the standpoint of practical utility, but that it is in consonance with the European conception of constitutional law.

*Marbury  
v. Madison*

As viewed by European eyes, a written constitution has a function or reason for being somewhat different from that ascribed to it by American political thought. Its principal purpose is to restrain the executive branch of the government rather than to limit the powers of the government as a whole or of the legislature in particular. And, when thus regarded, it can be shown that there are no overwhelming or conclusive reasons why the judges rather than the law-makers should have the final word as to what public acts are permitted by the Constitution. Under any constitutional system it is essential that somewhere must be located the final power of determining the constitutional validity of governmental acts. In whatever organ this decisive authority is located it may conceivably be misused. This possible danger cannot be avoided. The question is thus the purely practical one of placing it where it will probably be most wisely exercised.

Reasons for  
European  
practice

That to the executive should not be given the right, in the last instance, to determine the legality of its own acts,

tions as to the infringement of the Constitution by statutes. See above, p. 64. The Czechoslovak Constitution provides (Art. 102) that "judges in passing upon a legal question may examine the validity of an Ordinance; as to a Law they may enquire only whether it was duly promulgated."

<sup>11</sup> Cranch 137.

Advantages  
of American  
system

is apparent to all, for this would mean the union in the same hands of the military or physical power of the State and the right to determine the manner in which and the purposes for which it may be employed. This would be the very negation of constitutionalism—of government by law. The choice thus lies between the legislative and judicial branches as the depository of the right to give conclusive interpretation to constitutional provisions.

The objection to locating this authority in the legislature arises from the fact that the law-making body is usually composed of a considerable number of persons who are apt to be swayed by partisan prejudices and passions, and by a very natural inclination to minimize restraints upon its freedom of action, with the result that it cannot be expected to yield as readily and consistently to the dictates of reason and logic as the courts could be expected to do when construing the provisions of the fundamental instrument of government. There can thus be no question that the European solution of this constitutional problem results in giving to constitutional limitations a weaker restraining force than does the American practice.<sup>1</sup>

Its disad-  
vantages

But, on the other hand, under the American system there is the great disadvantage that friction between the legislative and judicial branches of the government is unavoidable, and, furthermore, as experience has shown, a constitu-

<sup>1</sup>In France, "there is a considerable, and apparently a growing, body of opinion favorable to the establishment of judicial control. Two conservative parties, the Liberal Action and the Progressists, have included it in their platforms. A number of eminent publicists, such as Maurice Hauriou and Gaston Jèze, have expressed themselves strongly in its favor. Some contend that the courts should, as in the United States, assert the prerogative without formal authorization; others urge the necessity of constitutional amendments." Sait, *Government and Politics of France*, p. 23. Leyret, in his recent book, *Le Gouvernement et le Parlement*, urges the constitutional proclamation of a declaration of individual rights, and the institution of a Supreme Court, "guaranteeing the Constitution, the Declaration, the Nation." (p. 31). See also, Garner, "Judicial Control of Administrative and Legislative Acts in France," *American Political Science Review*, Vol. IX. p. 637. The fact should not be lost sight of, however, that where the Constitution does not have substantive limitations on legislative power, and where it can be so easily amended—both true of France—the judicial power of declaring laws unconstitutional would be less of a check than in the United States, where there are limitations and where amendment is difficult.



tional conservatism is created which makes it difficult for a government to adopt new policies and new administrative methods which may be imperatively needed in order to meet new industrial and political conditions or altered conceptions of social justice. Free opportunity for healthful political development is thus denied and the constitution tends to become a strait-jacket rather than a commodious garment. Especially disadvantageous is this judicial restraint of legislative action when the constitution upon which it is based is one that can be amended only with great difficulty, for, when this is the case, the people possess no ready legal means whereby they may enlarge the legislative powers so as to overcome the constitutional obstacles which the courts may declare to exist.<sup>1</sup>

Constitutional strait-jackets

A further disadvantageous feature of the American system is that it introduces a certain degree of uncertainty as to the validity of governmental acts which lie upon the border of constitutional grants of power. The constitutional validity of a law is not finally determined until the Supreme Court of the United States has been called upon to decide a case in which the application of the law is necessarily involved. This may not happen for some time. Meanwhile, the laws are enforced, and liabilities incurred and rights gained under them, all of which fall to the ground if the laws are declared invalid.<sup>2</sup>

Uncertainty and Justice

Earlier in this chapter it was pointed out that an important respect in which the governments of the world differ as regards the relation of their judiciaries to the other

<sup>1</sup>On the power of American courts to declare legislation unconstitutional, see Haines, *The American Doctrine of Judicial Supremacy*; Beard, *The Supreme Court and the Constitution*; Dougherty, *Power of the Federal Judiciary over Legislation*; Corwin, *The Doctrine of Judicial Review*; McLaughlin, *The Courts, the Constitution and Parties*; Brinton Coxe, *Judicial Power and Unconstitutional Legislation*; Horace Davis, *The Judicial Veto*; Roe, *Our Judicial Oligarchy*, and Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*.

<sup>2</sup>Cf. for example, the Lever Act, the prosecutions under it, and the decision of the United States Supreme Court, *U. S. v. L. Cohen Grocery Co.*, No. 324, October Term, 1920, decided February 28, 1921. See also *Newberry et al. v. U. S.*, No. 559, October Term, 1920, refusing to give effect to Section 8, of the Act of June 25, 1910 (36 Stat. at L. 822).

departments of government is as to the extent to which the ordinary courts are granted the right to determine the validity of the official acts of administrative officials. To a discussion of this point of difference we now turn.

Review of  
Administra-  
tive De-  
cisions

The American doctrine as well as that of Great Britain and her possessions is that the ordinary courts have full jurisdiction to give to private individuals appropriate legal relief in all cases in which their rights are violated or threatened to be violated by illegal acts on the part of an executive official.<sup>1</sup> In other words, the ordinary courts will inquire into all questioned administrative acts, committed or threatened, and, if found *ultra vires* or illegal for any other reason, will enjoin their performance or award personal damages against the persons responsible for them. Thus, by the writ of *quo warranto*, the courts will examine into the right of an official to the public office which he claims to hold; by writ of *mandamus* they will order him to perform acts which the law directs him to perform;<sup>2</sup> by *injunction* they will prohibit acts which he has no legal right to do; by *certiorari* they will examine into the jurisdiction of administrative agencies. Resort to these special writs (including *habeas corpus*, if the regulations objected to deprive a person of liberty) is more frequent and more profitable than the other remedies mentioned. Criminal proceedings against the administrative officers are also possible and suits between individuals frequently raise the question of the validity of administrative regulations.

Anglo-  
American  
Practice

In no case, however, unless expressly authorized so to do, will the courts entertain a suit against the State it-

<sup>1</sup>In Great Britain the King cannot be held personally responsible in the courts for his acts, but he commits no official act except under the advice of one of his ministers of state, who thereby assumes political and legal responsibility for it. In the United States the President, and in some of the individual states of the Union the Governor, is not subject to compulsory judicial process, but for a misuse of his discretionary constitutional powers or the commission of illegal acts he may be held responsible by impeachment. If successfully impeached he loses his office and may thereupon be held civilly or criminally liable for any illegal acts which, while President or Governor, he may have committed.

<sup>2</sup>That is, what are known as "ministerial acts"—those the performance of which is not made discretionary merely.

self. And thus it often happens that an individual who has a just claim against the State is not able to enforce it when there is no official against whom he can personally proceed. The distinction between these cases, which the courts will deem to be, in effect, suits against the State itself and therefore not to be entertained by them, and those in which it will be held that the official who is named as the defendant can be held personally responsible, raises very difficult questions of constitutional law which cannot be here discussed. It may, however, be said that it is usual both in the United States and in other countries for permission to be given to individuals to sue the State itself for the recovery of claims arising out of contracts, express or implied; but rarely does a State permit itself to be sued for money damages arising out of illegal acts of its officials. In these cases the only relief is to proceed against the official personally, that is, to obtain a judgment against him which can be collected out of any property that he may possess. If the official's illegal act has been not simply what is known as a tort, that is, a civil wrong, but in violation of a criminal law, he can also be proceeded against in the ordinary criminal courts. And in neither case can he set up his official character as a defense or warrant for acts not authorized by law. Occasionally it happens that when an individual is recognized to have an equitable claim against his government which the courts cannot entertain, the legislature will appropriate a sum for its payment.<sup>1</sup>

Suability of  
the State

Suits against  
state agents

<sup>1</sup>The question of whether the State should allow itself to be sued for its torts is one of the most interesting and important in current political discussion. See Laski, *Authority in the Modern State*, p. 96, and authorities referred to; Borchard, *State Indemnity for Errors of Criminal Justice* (62nd Congress, 3d Session, Senate Document, No. 974); Maguire, "State Liability for Tort," *Harvard Law Review*, Vol. XXX, p. 20; Goodnow, *Comparative Administrative Law*, Vol. II, Book VI, Chapter II; Laski, "The Responsibility of the State in England," *Harvard Law Review*, Vol. XXXII, p. 447; Fleischman, "The Dishonesty of Sovereignities," *Reports New York Bar Association*, Vol. XXXIII, p. 229 (1910); Singewald, *The Doctrine of Non-Suability of the State in the United States* (Johns Hopkins Studies, Vol. XXVIII); and Zane, "A Legal Heresy," *Illinois Law Review*, Vol. XIII, p. 431 (1919).



Continental  
Administrative Law

As opposed to the Anglo-American doctrine which has been above stated, is the practice of France and other European countries according to which the validity of purely administrative acts is determined in special administrative courts. These are judicial tribunals, but are so constituted that their personnel and procedure are more or less subject to administrative control. This European practice is founded upon two beliefs: first, that questions of administrative right are often of a highly technical character and usually involve considerations of administrative expediency which the ordinary courts cannot be supposed to be qualified intelligently to determine; and second, that to give the jurisdiction in question to the ordinary courts would open the way to an undue judicial interference with the executive. In other words, European countries construe the principle of the "separation of powers" as regards this point, in a manner opposite to that in which Great Britain and the United States have interpreted it.<sup>1</sup>

The ques-  
tion of effi-  
ciency

It cannot be denied that, viewed from the standpoint of administrative efficiency, the continental practice is better than the Anglo-American. One defect is, however, that it makes it easily possible for the administration, through the control which it exercises over the special administrative tribunals, unduly to broaden its own legal powers, or, where these have been substantially exceeded, to deny redress or protection to the individual who is thereby injured or oppressed. It is, however, to be said that, in actual practice, this danger has for the most part remained in Europe only a possible one. In other

<sup>1</sup> "To permit the ordinary courts of Law to try a functionary for an administrative act would be in French eyes, to allow the Judiciary to interfere with the Executive, so the very same doctrine which in America secures the independence of the Judiciary from the Executive is used in France to secure the independence of the Executive, nominally as against the Judiciary, but really as against the public, for the agents of the Executive thereby escape direct liability to the citizen, being themselves, through their special Courts, the judges not only of the facts of a case, but also interpreters of the law to be applied." Bryce, *Modern Democracies*, Vol. I, p. 278.

words, we do not find that in Europe the rights of individuals are more seriously invaded by the governments than they have been in the United States and Great Britain.<sup>1</sup> A number of authorities, indeed, think that the system is better than ours.

Comparative merits of the two systems

A false impression would be gained if it were understood that in the United States and Great Britain administrative agencies are not authorized to exercise functions which both in substance and procedure are judicial in character.<sup>2</sup> The judicial functions thus administratively exercised are, however, of a special character, and, because of their importance, need to be described.

The judicial function, as exercised by the ordinary courts, involves two distinct operations; first, the ascertainment of the facts in dispute; and second, the determination of the law applicable to the facts as thus determined. And, in addition, there is the assumption which the courts decide for themselves (subject in the case of inferior courts to appeal to the higher courts) that they have jurisdiction to entertain the suits that they decide.

Now, especially during recent years, the practice of legislatures has been to lay down general rules for the guidance of administrative agents rather than to attempt to specify exactly what they shall be authorized to do in

The Nature of the Judicial Function

<sup>1</sup>On the French administrative courts, see Dicey, *The Law of the Constitution*, p. xliii ff. (8th ed.); Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 57; Goodnow, *Comparative Administrative Law*; and Sait, *Government and Politics of France*, Chap. XI and references. Lord Bryce's view, given above, should be considered in connection with the opinions of other writers competent to judge. Thus, Goodnow (*Principles of Constitutional Government*, pp. 243-244) says that it is of little importance whether there are two systems of courts or one, the important thing being the securing of independence of the executive. For a very able defence of the French system see Duguit, "The French Administrative Courts," *Political Science Quarterly*, Vol. XXIX, p. 385. Dicey, it may be added, modified in later editions the adverse view expressed in the first edition of *The Law of the Constitution*. To-day, says Professor Sait, "there are many who accept his [President Goodnow's] conclusions as to the superiority of the continental system and who see in it a refuge from the intolerable abuses of our technical procedure" (p. 397).

<sup>2</sup>On the growth of administrative law in the United States, see Bowman, "American Administrative Tribunals," *Political Science Quarterly*, Vol. XXI, p. 609 (December, 1906); "The Growth of Administrative Law in America," *Harvard Law Review*, February, 1918, and the references above, pp. 194, 195.

The facts  
in dispute

every particular case. The duty is thus thrown upon administrative officials, or boards or commissions, of applying these rules to special conditions as they arise. In many cases this is done by the issuance of comprehensively binding administrative rules or ordinances. But often it becomes necessary for the administrative agent or organ to issue specific orders addressed to specific persons or corporations directing that they do or do not perform certain particular acts. These orders are usually founded upon hearings had before the administrative official or board or commission, which hearings are essentially judicial in form, and the decisions arrived at essentially judicial in character. Thus opportunity is given for the presentation of evidence by the parties whose interests will be affected by the action that is proposed to be taken, and arguments for and against this action are made, and, guided by the facts thus disclosed, and the reasoning presented, the administrative decisions are made.

In the United States the giving of an opportunity to the parties interested thus to be heard, before administrative action is taken, or to have it modified after it has been taken, is required by the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. This requirement is satisfied when a hearing is furnished before an administrative tribunal: in other words, it is not necessary that it be had before a court of law.

The law  
applicable  
to the facts

To the determinations thus administratively reached a conclusive force may be given, that is, their substantial correctness may not be attacked in the courts of law. But the question whether the parties have been offered a fair opportunity to be heard, and whether in other respects a due procedure has been followed, is always open to judicial examination. And, furthermore, the courts have always the authority to determine whether the administrative authority has acted within its legal competence and accord-



ing to the general principles laid down by the legislature for its guidance, or whether, upon the purely substantive side, the administrative order, whether within the terms of the law or not, is so arbitrary or extreme in character as to amount to, if enforced, a deprivation of life, liberty, or property without due process of law. An illustration will perhaps render these principles more easily understood.

Congress has provided by law that interstate railway rates shall be just and reasonable, and that the Interstate Commerce Commission, which it has established as its agent, shall have the power to determine in specific instances what rates satisfy this requirement. As a result of hearings had before the Commission sitting as an administrative tribunal at which interested shippers and railway companies are given the opportunity to present such evidence and arguments as they may desire, an order is issued fixing the transportation charges that may be made for the service in question. This determination, so far as it involves the finding of facts and the exercise of judgment as to what, in the light of these facts, is reasonable, is final and conclusive upon the parties affected. It may, however, be attacked in the courts of law upon the following grounds: (1) that the Interstate Commerce Commission was without legal authority in the matter, as, for example, would be the case if the order in question related to railway transportation that is not interstate in character; or (2) that the Commission did not give to the parties affected a fair opportunity to be heard as to the propriety of the order; or (3) that the rate fixed was so unreasonably low as to be confiscatory as regards the railways, that is, to compel them to operate at a loss or to prevent them from earning a reasonable profit and thus in effect to deprive them of property without due process of law, or so high as regards the shippers of freight as to deprive them of their property. However, if this third argument is advanced, the courts are not justified in substituting their

Powers of  
Interstate  
Commerce  
Commission

Judicial  
Review

own judgment, as to what is just and reasonable, for that of the Commission. They may with propriety interpose their restraining order only in case it is found that the sphere of reasonable judgment as to what is a just and proper rate has been overstepped by the Commission, and a rate fixed which, in the judgment of the courts, is so clearly unreasonable and unjust as to amount to a denial of due process of law upon its substantive side.

Legislative  
provision for  
review

It is always within the competence of the legislature to provide in any given case that the determinations of the administrative tribunal shall not have a final and conclusive character, but shall be reviewable in the courts both as regards the findings of facts and the reasonableness of the determinations founded upon them. In some cases, also, it is provided by the legislature that an order issued by an administrative tribunal shall not be enforceable until an order to that effect is first obtained from the courts.<sup>1</sup>

Substantive  
and pro-  
cedural  
rules

Under all systems rules of law fall into two classes which are distinct from each other. The one class includes the actual or "substantive" rules of conduct which the State recognizes as legal and which it will enforce; the other class includes the procedural rules which determine the conditions under which and the manner in which judicial relief will be granted to those who resort to the courts for the enforcement of the rights which the laws, upon their substantive side, create. Thus these rules of procedure determine what courts shall exist, what their respective jurisdictions, whether original or appellate, shall be, the formalities for instituting and carrying on judicial proceedings, the forms of relief that may be awarded, and the manner in which an enforcement of judicial judgments or decrees may be obtained.

With regard to laws of the first or substantive class, the

<sup>1</sup>For references on the judicial review of administrative determinations, see above, p. 195.

problem of government is to bring into existence rules which are just as between individuals and politically and economically expedient when judged from the standpoint of the public interest. As regards laws of the second or procedural or, as they are sometimes called, the adjective class, the problem of government is to provide judicial tribunals which are competent to grant speedy, inexpensive, and certain justice in all matters which are brought before them, and with their jurisdictions sufficiently broad to include all cases in which substantial interests may be involved. In other words, that where there is a wrong, a judicial remedy shall be provided.

Importance  
of proce-  
dural rules

It is important that rules of judicial procedure should be strictly followed, but this does not mean that errors which do not prejudice the interests of any of the parties should furnish grounds for invalidating the whole proceedings. Under most systems of law provision is made for appellate tribunals which are empowered to grant new trials in cases in which the trial courts, or courts of first instance as they are called, have permitted, or themselves committed, errors of procedure. In the United States this authority to nullify the proceedings in the lower courts upon purely procedural grounds has undoubtedly been greatly abused. Especially has this been so with regard to criminal cases. In thousands of cases, substantial justice has thus been defeated by the granting of new trials in cases in which the errors of practice or procedure that have been found by the superior courts have been of such a trivial or inconsequential character that by no stretch of the imagination could they be said to have influenced the verdicts or judgments rendered in the trial courts. Fortunately, however, recent years have witnessed an awakening upon the part of the public as well as of the appellate courts themselves to the evil results of this strict and essentially irrational adherence to the letter of procedural laws without regard to their spirit and intent. This has

The right  
of appeal



resulted in some cases in legislation whereby the rules of procedure have been amended, and, in other cases to a more enlightened and liberalized spirit upon the part of appellate tribunals. Though not now so great as it once was, the evil is, however, still a serious one in America.

One  
system  
of Courts

It is highly important, however, that all the courts should be parts of a single system and operate in subordination to a central authority which has the power to prescribe the detailed rules of procedure and practice by which they all shall be governed. Only in this way can the system be made a flexible one, that is, one of which the rules can be easily changed as experience shows the need. This central rule-making authority may very well be the court of last resort.

In systems of federal government such as exists in the United States the problem of judicial administration is an especially complicated one. In the first place, there is the principle, from which it is not practicable to depart, that the writs of the courts of the individual states shall not be enforceable outside of the respective state boundaries. Thus a fugitive from justice can be apprehended and brought to trial only by what are known as extradition proceedings; the attendance of witnesses in the other states, where their presence is desired, cannot be secured unless they are willing to come; the judgments and decrees of the courts of one state cannot be enforced as such in other states but have to be first sued upon in the courts of the other states and new judgments or decrees obtained thereupon; even the persons entitled to practise law in one state can appear as counsel in the courts of other states only upon permission obtained from them. The foregoing principles do not apply to the courts of the National Government. Their writs run throughout the Union, but their jurisdictions extend only to special cases, being dependent upon the character of the parties litigant

Importance  
of Judiciary  
in Federal  
System

or the special character of the subject matter of the suits brought.

In the second place there is the necessity for bringing the operations of the federal and state judicial systems into harmony so that national supremacy will be secured and, at the same time, the state judiciaries protected in the autonomous exercise of their several jurisdictions. As the experience of the United States has shown, abundant opportunity for friction is here presented. The questions of constitutional law thus raised are, however, of too technical a character to be here discussed.

Harmony  
between  
Federal and  
State Codes

It is generally believed that the right of appeal has been too liberally granted in America. It does, indeed, furnish opportunity for the correction of errors, but the principle has been carried too far, with the result that litigation has been rendered unnecessarily costly and the rendering of final judgments unduly delayed. And then, too, as has already been pointed out, the appellate courts have themselves increased these evils by granting new trials upon the ground of merely technical errors which have worked prejudice to no one. But this evil is, of course, not inherent in the appellate system.

Appeals and  
Due Process  
of Law

The right of an appeal from a trial to an appellate court is not demanded by the constitutional requirement of due process of law. That is, it is not a matter of constitutional right but of legislative policy. On the whole, then, it would seem better that greater care should be taken in the selection of the judges of the trial courts, so that miscarriages of justice should be reduced to a minimum, and the right of appeal upon questions of fact and of procedure correspondingly curtailed. As regards questions of law it is necessary that appeals be permitted to the supreme court of the system in order that, by the decisions it renders, an authoritative determination of what is the law may be secured which will be binding upon all the lower courts.

In the appellate courts in America it is usual for three or more judges to sit, and to render judgments by a majority vote. Upon the Continent of Europe two or more judges sit in many of the lower courts, but in these the jury is not so generally used, especially in civil cases.<sup>1</sup>

#### TOPICS FOR FURTHER INVESTIGATION

The American Doctrine of Judicial Supremacy.—For references, see above, p. 395.

The United States Supreme Court as a House of Lords.—For references, see above, p. 392.

The Growth of Administrative Law in the United States.—For references, see above, p. 399.

French Administrative Courts.—For references, see above, p. 399.

The English Judicial System.—For references, see the note below.

The Administration of Justice in the United States.—R. H. Smith, *Justice and the Poor*, (Bulletin of the Carnegie Foundation for the Advancement of Teaching, 1919); *Bulletins of the American Judicature Society*, Vols. I-XIV.

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<sup>1</sup>On the English judiciary, see Lowell, *The Government of England*, Vol. II, p. 439 ff; on the French system, Sait, *Government and Politics of France*, Chapters XI and XII, Garner, "Criminal Procedure in France," *Yale Law Journal*, Vol. XXV, p. 255, and "Judicial Control of Administrative and Legislative Acts in France," *American Political Science Review*, Vol. IX, p. 637; on the Swiss system, Ogg, *The Governments of Europe*, (rev. ed.), p. 600 and Brooks, *Governments and Politics of Switzerland*, Chap. VII; for Germany, Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 281 and Garner, "The German Judiciary," *Political Science Quarterly*, Vol. XVII, p. 490 and Vol. XVIII, p. 512.



## CHAPTER XXII

### STATE GOVERNMENT IN THE UNITED STATES

ASIDE from the provision that their governments shall be republican in form, there is no restriction laid upon the states by the National Constitution as to the manner in which they shall organize themselves.<sup>1</sup> Each is thus left free to adopt that kind of government it may see fit, subject only to this one requirement, which none of them has desired to evade. In point of fact, however, notwithstanding this constitutional latitude of choice, there is a very considerable similarity in the general features of the governments which the forty-eight states have established. What will be said in this discussion will therefore be generally applicable to all of the states even if not specifically true in some instances.

General  
uniformity  
of State  
Govern-  
ments

In considering the organization of the executive branch, it is to be remembered that these governments have to perform but a part of the functions that ordinarily fall to the political institutions of a developed unitary State. In the first place, very important duties lie within the exclusive province of the National or Federal Government; and, in the second place, local self-government is so fully developed that very many public activities are handed over to the governing bodies which exist in the cities, the counties, and smaller administrative districts into which

Limited  
jurisdiction

<sup>1</sup>See above, p. 154. On problems of state government generally see the comprehensive discussions by A. N. Holcombe, *State Government in the United States* and J. M. Matthews, *Principles of State Administration*. Of special importance are the three collections of material prepared for the use of the Constitutional Conventions in New York (1915), Massachusetts (1917), and Illinois (1920). There is a full bibliography in Holcombe, and other material is referred to in the following notes.

Federal  
matters

all the states are divided. Thus, all questions of war and peace, of foreign affairs generally, of customs regulations, of currency, of post-offices, of naturalization and banking, patents and copyrights, and, in a considerable measure, of the regulation of railways, telegraphs, telephones, and express companies, are matters with which the governments of these states have no direct concern. The whole field of admiralty and maritime jurisdiction, except with reference to navigation upon purely intra-state waters and the establishment of harbor regulations, is withdrawn from the states.

And, finally, a very considerable number of the judicial controversies that arise in the United States are adjudicated in the federal rather than in the state courts, for it is to be remembered that, unlike the system followed in the federated states of the German Empire, the central government of the United States executes all its functions through governmental agencies established and maintained by itself, and which are separate from and independent of the governments of the several states of the Union.<sup>1</sup>

Devolution  
to local  
agencies

In the second place, as has been already mentioned, these states have seen fit to assign the performance of many of the duties that are constitutionally reserved to them to the local governing bodies of the smaller areas into which, for administrative purposes, they are subdivided. Thus it is, that the states of the American Union have not found it necessary to establish elaborately constructed executive branches of government such as are imperatively demanded by States which are not federal in character, or which have not developed effective systems of local government.

What has been said explains also the fact that in none of the states do we find an administrative organization

<sup>1</sup>But see Douglas, "A System of Federal Grants-in-Aid," *Political Science Quarterly*, June and December, 1920, and below, p. 483 n.

made up of great departments of government, headed by Ministers of State, and subject to the general control of a chief executive, aided by a cabinet of advisers, who formulate the public policies of the state and represent and defend them upon the floors of the legislature. In each state we find a legislative branch with all the legislative powers which the Federal Constitution has not withdrawn from the states or which those states have not seen fit in their own written Constitutions to place beyond the control of ordinary legislation. But, as is the case in the National Government, in no state is any attempt made to bring the executive and legislative branches into close working relation to each other by making the tenure of office of the chief executive officials dependent upon their obtaining the support of the legislature for their policies. The state constitutions, in a word, have clearly shown the influences of the constitutional theories and governmental plan of the federal instrument of government.<sup>1</sup> Three experiments with a unicameral legislature were abandoned;<sup>2</sup> the example of the federal Congress was controlling.

The constitutions of the states create the offices of the Governor and a few of the other important state officials, such as the Treasurer, the Auditor, the Attorney-General, etc., and describe in general terms what their duties and powers shall be, and also the terms of their office, their salaries, and the manner in which they shall be selected, which, in almost all cases, is by election by the people. To this extent the executive branch is independent of con-

Separation  
of Powers

Constitu-  
tional provi-  
sions for  
Executive

<sup>1</sup>Bryce, *The American Commonwealth*, Vol. I, Chap. XXXVIII.

<sup>2</sup>Schouler, *Constitutional Studies*, p. 52. "Whether or not in the American states a single unicameral legislative body could be safely entrusted with all the powers of both constitutional convention and legislature would depend mainly upon two factors. The first is the extent to which the legislatures can be relieved of the excessive burden of non-legislative duties which now so encumber their deliberations. The second is the extent to which the power of popular review over legislation can be effectively exercised by the state electorates. The relief of the legislatures from non-legislative duties is contingent upon the development of satisfactory methods for direct legislation, subject to suitable restrictions, by the electorates." Holcombe, *State Government in the United States*, p. 400.



trol by the legislative branch of government. Most proposals for the improvement of state government have urged that the number of elective officers be greatly reduced; that a very short ballot be resorted to, for, with a great number of persons to be chosen at the polls, the voter, unable to inform himself, is at the mercy of the party leaders who determine the nominees; and, after the election, responsibility is so divided as to be unenforcible.<sup>1</sup>

Administra-  
tive agencies  
created by  
Law

But all the other administrative agencies are the creation of the legislature, which can thus determine just how they shall be organized, and what powers they shall have, or whether they shall exist at all. Even in the case of these officials, however, there is no continuous control by the legislature, for, once created and established, frequently their only responsibility is to the courts in which they may be punished for any violations of law or any attempts to exercise authority which the law has not given them. Usually, however, their terms of office are for only one, two, three, or four years, and of course they will not be reappointed if they have given dissatisfaction by the manner in which they have performed their duties. In practically all cases they are, when appointed, members of the political party in power, and their failure to be reappointed may be due not to incompetence or dishonesty, but to having offended the party in power; or the opposing political party may have come into power, in which case it will make new appointments from its own ranks.

Civil Service  
Reform

In general, few qualifications for office are prescribed by law. What is known as civil service reform has not made sufficient progress in the states. This is to say that promotions and appointments are still dictated, to a large extent, by political **partisan** motives, rather than by a desire to obtain the best possible administration of pub-

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<sup>1</sup>For examples of lengthy ballots, see Holcombe, *State Government in the United States*, p. 210; Kales, *Unpopular Government in the United States*, p. 29; and Childs, *Short Ballot Principles*.

lic affairs, although recently, there have been some signs of an improvement.<sup>1</sup> When an official has been guilty of a very serious misfeasance or malfeasance of office he may be impeached and dismissed, or, in some cases, it is provided that he may be removed by the Governor. It is usual, however, to require that formal charges, specifying the misconduct complained of, shall be filed, and an opportunity be given to the person affected to show, if he can, that the charges are not true. Occasionally, the officials whose offices are created by the legislature are paid, in whole or in part, by the fees received by them from the persons who require their services, but in general they receive fixed salaries which are mentioned in the laws that provide for their appointment.

Tenure of  
office

Specifically, then, we find in all the states a chief executive, called the Governor; a few head officials, the most important of which are the Secretary of State, the Auditor, the Treasurer, and the Attorney-General; and a number of detached bureaus, commissions or boards, in some states more than a hundred in number. The Governor and the officials who have been designated are provided for in the Constitution itself, and they are in almost all cases elected by the people for comparatively short terms of office. The Secretary of State usually has charge of the records of the state and has certain other formal duties, such as publishing the laws, granting charters of incorporation to private business concerns, etc. The Auditor, as his title indicates, has the duty of seeing that public moneys are spent only in accordance with provisions of the law. The Treasurer is custodian of the moneys of the state, and takes care that no money is paid out of the funds of the state except as appropriated by the legislature. These funds are kept upon deposit in approved private banks in the state. The Attorney-General gives legal advice to the Governor and to other officials of the government, and

Executive  
Officials

<sup>1</sup>Munro, *Government of the United States*, p. 439.

defends the state's interests in the courts of law. In some of the states there is also a Lieutenant- or Vice-Governor, who has no important executive functions, but acts in place of the Governor in case of his death or disability.

The Governor

In all the states the title of Governor is given to the chief executive. He is elected by the people at a general election, the term of his office varying in the different states from one to four years. His powers are fixed in the Constitution, and are usually the following:

1. The general duty to see that the laws of the state are duly enforced.
2. The control of the state militia, or citizen soldiery. These he may call into active service whenever they are needed to maintain order, or to protect the state from invasion.
3. The appointing power with reference to many positions in the judicial as well as the executive branch of the government. The important fact should be pointed out that, unlike the President of the United States, he has no implied power to remove officials from office. This power he has only when it is specifically given to him by the Constitution or by law. In very many cases his appointments, to become effective, require the approval of the Senate or Upper House of the Legislature.
4. The pardoning power, which in some cases has to be exercised in connection with an advisory board.
5. The giving of advice and information to the legislature. This is given in the form of written messages, in which specific legislation may be urged. There is, however, no obligation upon the part of the legislature to give heed or even serious attention to the recommendations thus made.
6. The convening of the legislature in special or extraordinary sessions, and the adjourning of the legislature in case the two houses cannot agree upon a time

His powers



for adjournment. In more than half of the states the Constitution provides that the legislature shall meet biennially; in other states it meets annually, except in one state in which a session is had only once in four years. In a majority of the states the number of days which a session shall last is fixed by the Constitution.

7. The Governor, also, has a suspensive veto upon acts of the legislature, that is, a veto which may be overcome by a two-third vote in both houses. In some of the states, moreover, the Governor has the very important power of vetoing items in appropriation acts. That is, it is not necessary for him to veto the entire act, but he may select special items for disapproval, and this power has been construed to include the right to reduce the amount that the act mentions, and approve it as thus reduced. In this way the Governor is often able to prevent extravagant expenditure of the public money. It is a power, however, that the Governor must exercise with some caution, for otherwise he would antagonize the legislature itself as well as the interests in whose behalf the original appropriations are made. Mention may be made of the fact that the President of the United States has never claimed the right to veto special items in a law and approve the remainder. Many think, however, that it would be an advantage for him to have this power.<sup>1</sup>

Extent of  
veto power

Frequently the Governor is one of the leaders of his political party in the state. When this is the case he is able, through the control that he has of the party machinery, to exercise considerable personal influence upon the legislature; but his strictly constitutional powers are not such as to enable him to control the legislature except in so far as he is able to do this by the exercise of his veto power

Governor  
as political  
leader

<sup>1</sup>See Ford, *The Cost of Our National Government*.

or by appealing to their reason and patriotism in his written messages—for he has no power to dissolve the legislature and require a new election however much he may disapprove its actions.

In some few states there is an agitation to give the measures recommended by the Governor special rights of consideration in the legislature, that is, that these proposals shall have a privileged place upon the calendars of the houses of legislation which fix the order in which their business is to be conducted. As yet, however, this movement has made but very little headway, although there is little doubt as to its desirability. There is also a movement in a considerable number of the American states to introduce a budget system.

From what has already been said, it will be seen that the Governor occupies in the government of his state a position similar in some respects to that occupied by the President of the United States with regard to the National Government. This is especially true as to his independence from the control of the legislature, and of the independence of the legislature from his control. But the Governor's position is far different from that of the President when viewed from the standpoint of administrative control. For, as has been already said, the Governor has no power to remove from office officials who do not conform to his requests, and the laws give to him very little authority to issue commands which are legally obligatory upon officials of the administrative service.

In none of the states is there a cabinet of advisors to the Governor; and, in fact, since he has no parliamentary responsibility before the legislature, and is without any considerable power of control over the administrative services, there is little need for such a body. The Governor may, of course, confer from time to time with the higher executive officials, but he does not meet with them regularly as a single body. There is apparent in American political

His initiative in legislation

No state cabinets

opinion a growing demand that the Governor should be given greater powers, and something has already been done in this direction.<sup>1</sup>

Turning now to the other branches of the administrative service in the states, we find, as already pointed out, no great departments such as exist in the National Government and in the central governments of other great states. Instead there are a large number of independent services, organized as boards, bureaus, or commissions. Perhaps the most important problem connected with the reform of state administration has been the reorganization of these agencies and their consolidation into a few large departments. In 1916, Governor Lowden, of Illinois, made his campaign for the Governorship on this issue. After his election, the General Assembly passed the Civil Administrative Code, which "consolidated into nine departments more than fifty functions and departments previously independent of each other. It also provided for an executive budget. It is probably the most important and effective measure relating to governmental organization that has been enacted in any state in the Union."<sup>2</sup>

Lack of administrative  
Integration

In many cases these state administrative agencies have simply the duty of exercising a general supervision over

<sup>1</sup>"The governor, therefore, is not the executive; he is but a single piece of the executive. There are other pieces coördinated with him over which he has no direct official control, and which are of less dignity than he only because they have no power to control legislation, as he may do by the exercise of his veto, and because his position is more representative, perhaps, of the state government as a whole, of the people of the state as a unit. Indeed, it may be doubted whether the governor and other principal officers of a state government can even, when taken together, be correctly described as 'the executive,' since the actual execution of the great majority of the laws does not rest with them but with the local officers chosen by the towns and counties and bound to the central authorities of the state by no real bonds of responsibility whatever. Throughout all the states there is a significant distinction, a real separation, between 'state' and 'local' officials: local officials are not regarded, that is, as state officers, but as officers of their districts only, responsible to constituents, not to central authorities." Woodrow Wilson, *The State*, p. 500.

On the recent increase in the power of the Governor, see Matthews, *Principles of State Administration*; Munro, *The Government of the United States*, p. 434; and Garner, "Executive Participation in Legislation," *Proceedings of the American Political Science Association*, Vol. X, p. 176 (1914).

<sup>2</sup>*Constitutional Convention Bulletins* (Illinois, 1920), p. 626.



Growth of  
administra-  
tive agencies

the execution of some special law or groups of laws, and of issuing ordinances for this purpose. Thus we find commissioners of insurance, of banking, of factory inspection, of mines, of jails, of penitentiaries, and boards for the issuance of all kinds of licenses, such as those giving the right to manufacture or sell certain commodities, such as tobacco, to practice certain professions, such as the law or medicine or dentistry.

Of especial importance, however, are the boards or commissions which have to deal with the subjects of poor-relief, the care of the defective and delinquent classes, of public roads, and of education; and, more recently, of great importance have been the agencies which issue regulations concerning the services to be rendered and the proper charges to be made by public-utility companies. These include railway, telegraph, telephone, and express companies, water, gas and electric light and traction concerns, etc. But, most important of all are those agencies which have to deal with the assessment and collection of taxes.

In some cases the heads of these services are elected by the people, but, more generally, they are appointed by the Governor, usually subject to confirmation by the upper house of the legislature. In some cases, also, the boards are composed in whole or in part of *ex officio* members, that is, of other officials who are assigned by law the duty of serving in these capacities, in addition to performing their special official functions.

Government  
by Commis-  
sion

The growth in the states of so-called commission government, that is, the establishment of a large number of boards or commissions having supervisory, examining, educative, and investigating powers, has been a marked characteristic of recent years, and seems to be a wise development. In this way the legislature is not only furnished with much information which it is indispensable that it should have if it is to legislate intelligently, but is

also enabled to pass laws expressed in general terms, leaving their details, and application to particular conditions, to the judgment of these permanent agencies which necessarily come to have a better knowledge of them than it is possible for the legislature itself to have or to acquire. And, incidentally, there is the further advantage that the legislature is thus given more time to do its other work.

**Its advantages**

In only one or two states out of the forty-eight is there an organized state police force or constabulary, all the ordinary policing being done by the cities or other local governing bodies. There has been, however, in each state, what is known as a militia or citizen soldiery, composed of persons who voluntarily enlist, receive equipment, are given a limited amount of military training and may be called out by the Governor to assist him in maintaining order and securing the enforcement of law in cases of serious riot and domestic disturbance when the ordinary local constabulary is not able to meet the situation. These state militia forces, it may also be said, can be called into the service of the National Government when their aid is found necessary. They were employed to guard the border between the United States and Mexico; and Congress, in 1916, increasing the size of the national or regular army of the United States made provision for greatly improving the state militia, appropriated money for the purpose, and gave to the President as Commander-in-Chief of the Army and Navy greater powers of control over these forces.

**State Militia**

What has been said is sufficient to show that, as compared with the federal or national system of administrative organization, the executive organization of the states of the American Union lacks integration and is correspondingly inefficient. By lack of integration is meant that the different parts of the service are not closely knit together into one whole, and arranged in an ascending series or hierarchical order so that the different functions of gov-

**Need of administrative re-organization**

ernment are grouped together in their logical order, and these groups in turn united into larger "Departments", and the inferior officers made subject to the mandatory orders of their immediate superiors, and these, in their turn, under the control of their chiefs, and, finally, these department chiefs amenable to the authority of the chief executive, the Governor of the state. In general, then, it may be said that the administrative systems of the American states have furnished more examples to avoid than to follow, and this fact is very generally recognized by students of government.

#### State Law- making

Each one of the American commonwealths has solved the problem of law-making according to its own judgment, subject only to the condition that forms of Republican government are maintained. This requirement, which is imposed upon the states by the Federal Constitution, and which has never received any authoritative interpretation, would seem to mean little more than that the chief executive (Governor) shall be responsible to the people, and that each state shall possess an elected body of men who shall have general legislative powers. The Federal Constitution thus leaves great latitude to the states as to the manner in which they shall organize the legislative branches of their government. In fact, however, as was pointed out with regard to their executive organizations, there is in all the states a very considerable similarity in their legislatures.

#### Powers of State Legislatures

The states of the American Union have all the legislative powers possessed by any sovereign State, except those that have been granted to the National Government by the Federal Constitution, or by that instrument denied to them. In this respect the rule applicable to these state legislatures is the contrary of that applicable to the National Congress. For the Congress has only the powers which are granted to it, while the state legislatures have a plenitude of law-making authority except as to matters



expressly or by necessary implication withdrawn from them.

It is, however, a characteristic of American constitutional practice that the people are unwilling that their own representatives should have full legislative discretion with reference to a considerable number of matters. These matters are, by the written constitutions which the individual states have seen fit to adopt, withdrawn from control by statutes enacted by their law-making branches. And these restrictions, it is to be observed, relate not only to matters of procedure, but also to what are called substantive rights. That is, there are certain things, especially with reference to rights of personal liberty and the ownership and use of property by the individual, which the constitutions say shall not be abridged by the legislature, by any procedure whatever. Thus it is that the competences of the legislatures of the American states are limited not only by the provisions of the Federal Constitution, but also by numerous provisions of the constitutions of the states themselves.

Protection  
of private  
rights

The powers of the National Legislature, though very important, are not many in number. Thus it falls within the province of the state legislatures to pass all the laws that are necessary for arranging and maintaining the governments of the states, for framing all the necessary police laws or ordinances (so far as these are not placed within the primary control of local governing bodies), and, in general, to determine what shall be the great body of private laws, civil and criminal, that regulate the lives, and properties of the people. With reference to this last matter, however, it is to be remarked that most of this body of private law is what is known as common law, which does not exist in the shape of formal statutes or legislative enactments, but has been slowly built up by custom and decisions of the courts. Much of this common law was inherited or borrowed from the English common law.

Common  
law and  
legislation

These common-law juridical principles, though nowhere stated in words that are authoritative and binding, are nevertheless definitely known, and probably there is not much greater difficulty in determining their provisions than there is in ascertaining the exact meaning of the language employed in legislative enactments.

#### Codification

It is within the power of the legislatures of the states to alter this common law in any way that they may see fit—subject of course to the special constitutional limitations to which reference has already been made, and this power to add to, or to change, the common law by statutes is constantly exercised; but it still remains true that the great body of American private law consists of common-law doctrines. In a considerable number of states, so-called codes have been adopted, but these comprehensive collections of laws in very large measure simply state in statutory form the older common-law doctrines.

#### Bicameral Legislatures

In all of the states the legislature consists of two houses; the upper house, usually termed the Senate, and the lower, the House of Representatives. In nearly all the states, also, biennial sessions lasting from forty-five to ninety days are held. Extra sessions may be called by the Governor, and the terms of senators and representatives are from two to four years. The number of members of the upper house varies in different states from 17 to 63. Of the lower house the number varies from 35 to 390. The general opinion in America is that the best results are obtained when the legislators are few in number.

All persons over twenty-one years of age, not specially disqualified, have the right to vote. In one or two states there is a low property qualification, and in other states educational tests are applied. In a number of the southern states of the Union these and some other less important qualifications are prescribed for the purpose of denying the suffrage to their negro citizens, and, as they are applied in actual practice, they indirectly reach this result, al-

though it is expressly declared by the Fifteenth Amendment that no state shall deny the right to vote to any one on account of his race, color, or previous condition of servitude. Except for this provision and the recent woman's suffrage Amendment, the states are left constitutionally free to regulate the suffrage as each sees fit. It is simply provided in the Federal Constitution that those persons who, in the states, shall have the right to vote for the members of the more numerous branch of the state legislature, shall, *ipso facto*, have the right to vote for members of the Lower House of the national legislature; and, by the Seventeenth Amendment, the same provision is applied to the election of United States Senators in place of their former election by the state legislatures. Thus the states not only control their own electorates for their own purposes, but for the election of members of both houses of Congress.

Qualifica-  
tions for  
Suffrage

For the purpose of choosing their own legislatures, the states are divided into senatorial and representative districts from each of which one senator or one representative is elected. In practice, if not always according to express constitutional provision, a senator or representative must reside in the district from which he is elected. It is quite usual to provide that only a part of the senate shall be elected at any one election. Thus, like the United States Senate, the Upper Houses of many of the state legislatures are continuous bodies. The electorate for the Upper Houses of these legislatures is the same as that for the Lower Houses, the only difference being that the senators are elected from larger districts.

Electoral  
districts

For the transaction of ordinary business a quorum consists of a majority of the members of each house, although in some instances a larger number is required. For example, the Constitution of the State of New York requires that for the passage of bills appropriating money or imposing taxes, three fifths of the total number of members



Executive  
and Legisla-  
ture

shall be present. For the transaction of ordinary business, also, a majority vote of the members present is sufficient—there being in attendance of course a quorum. Many of the state constitutions provide, however, that for the final vote which converts a measure into law, the approval of a majority of the entire membership of the house is required. But for special purposes a still larger vote, two thirds, three fifths, or three fourths, is demanded. This is true, for example, with reference to approvals of nominations to offices made by the Governor, to impeachment proceedings, and to the overriding of gubernatorial vetoes. One state does not give a veto power to the Governor. In three states his veto may be overcome by a simple majority vote in both houses. In eight states a majority of the whole membership in each house is required; in other states a three-fifth or a two-third vote is demanded. In all cases, in order to become a law, a measure must secure the approval of both chambers of the legislature, and receive the approval of the Governor, or the overriding of his veto (except in North Carolina which does not permit the governor to exercise the veto power).

Members of the legislatures are not allowed to hold any other civil office in the state or in the National Government, and it is generally provided that an acceptance by a member of any such office shall operate *ipso facto* to vacate his seat. The constitutions of the states attempt to fix in some measures the procedure of law-making, but, in general, the following observations apply to all the state legislatures:

Legislative  
Procedure

Each house adopts its own rules of order and parliamentary procedure, and elects its own presiding officer except in those states where there is a Lieutenant- or Vice-Governor who presides over the upper house. Each house is required to keep a Journal, and, in certain circumstances, to record therein the manner in which the members individually vote. Verbatim reports of debates and other

proceedings in the legislature are not published. Newspapers and other private agencies are, however, free to publish them as fully as they please. Sessions are public, although, under special conditions, secret sessions may be held.

Bills may be introduced in either house, and when passed in the one house, may be amended in the other, in which case the bill as amended and passed must of course be returned to the other house for its approval. Thus a bill may pass back and forth from one house to the other several times. It is more usual, however, in cases where legislation is desired by both houses, though they are not in agreement as to its exact character, to have appointed what is known as a Conference Committee composed of members selected by both houses, which committee seeks to agree upon a measure that will be acceptable to both of the houses. When this agreement is reached the measure is reported back to both houses, where, ordinarily, it is not subject to further amendment, but may be then accepted or rejected as each house may see fit. In almost all cases, however, a Conference Report is approved by the houses.

Disputes  
between  
houses

In most of the states the constitutions provide that when an act applicable to the whole state is possible, the attempt shall not be made to provide what is known as special legislation for particular parts of the state. Where, however, the matter is one which, from its very nature, is of concern to only a particular locality, local legislation is permitted and is, indeed, unavoidable. It is quite usual, also, for the constitutions to provide that only one matter shall be dealt with in a single act, and that the title shall be truly descriptive of this matter.

Special  
legislation

Each house of the legislature is empowered to determine whether persons claiming membership have the qualifications prescribed by law, and have been duly elected. In all of the states these elections are by printed ballots ac-

Purity of  
elections

cording to what is known as the Australian System. Under this system the names of the candidates of all parties are printed upon one ballot, one copy of which is given to each voter, who thereupon is given the opportunity to mark it in secret so as to show the person or persons for whom he desires to vote. These details are very important in preserving that purity of elections, which is so essential to the working of democracy, but these legal provisions and penalties are ineffective unless enforced by a widely diffused moral consciousness in the community.

In some states, within recent years, there have been established very useful agencies known as Legislative-Reference or Information Bureaus, and Bill-Drafting Commissions. These are non-partizan services administered by trained experts. The province of the Legislative Bureau or Legislative-Information Bureau, is to provide the legislature with correct and impartial information upon which intelligent legislation may be founded. Thus, upon request, or in anticipation of the request being made, the Bureau will collect the necessary facts regarding the necessity for and the general nature of the legislation which is proposed, and will report upon the manner in which similar legislation has operated in other states of the Union or in foreign countries where it has been tried.

Legislative  
Drafting

It does not need to be said that the services of such a bureau are valuable only in case the persons who administer it are without partizan bias, and scientifically trained so as to know where the necessary information may be obtained, and to exercise intelligent judgment as to what facts are pertinent and valuable. In order that they may be able to supply information without delay, all of these bureaus are provided with funds and clerical assistance sufficient to enable them to collect in their own libraries, and catalogue and index, documents, reports, and other material bearing upon probable subjects of legislation.



The province of Bill-Drafting Bureaus is to supply experts who, upon request of the legislature, may furnish drafts of bills that are stated in technically correct and unambiguous language, and also to point out in what respects, as a legal proposition, a proposed law is in conformity with existing laws. These experts, it will be observed, are not concerned with the substantive contents of a law or with its wisdom—these are matters for the legislature itself to determine. Their function is simply to see that the will of the legislature finds expression in consistent and unambiguous terms.

As is the case with regard to the Congress of the United States, the legislatures of the individual states organize themselves for the conduct of business upon what is known as the Committee System. According to this system each house of the legislature appoints from among its members a considerable number of committees, which remain in existence during the session or the term of the legislature. Each committee is under a chairman who is usually appointed by the presiding officer of the house, who also appoints the other committee members. Every member of the house is upon one or more of these committees. Each committee has jurisdiction over a certain subject, as, for example, appropriations, railways, education, public health, etc. When legislative proposals are introduced—and they may be introduced freely by any member—they are referred by the presiding officer to the appropriate committees as determined by their subject matter.

Committees  
of the  
Legislature

In the committees, these proposals, thus referred, are discussed, and sometimes witnesses heard and public hearings had, and, if the committee sees fit, a report made back to the House, either approving or disapproving of the measures. In very many cases, however, no report is made, and thus the proposals receive no further consideration by the legislature. They are then said to “die in committee.” If a committee does not make a report,

Their  
powers

and the house desires it to do so, it may so order, for the merits of no legislative measure can receive discussion upon the floor of the legislative chamber until it has gone through the committee stage and been reported back to the house.

Committee  
of the  
Whole

After being so reported the measures are subject to further amendment, and are often discussed clause by clause in what is known as the Committee of the Whole, which is nothing more than the house itself acting under certain rules of procedure which are not applicable when the house is not "in committee." One of the great advantages of operating under the status of Committee of the Whole is that the house may agree that a smaller number than a majority shall constitute a quorum. But in all cases, before a proposal is put upon its final passage into law, the house itself in its ordinary form of assembly must pass upon it in order that the constitutional requirements regarding a quorum and the size of the vote may be met.

Order of  
Business

All the legislatures in their so-called Standing Orders provide a regular order for transacting business, and lay down rules governing the length of speeches and the number of times a member may speak upon the same question, and make other regulations regarding the preferential treatment that certain kinds of business shall receive. In all of the legislatures, however (and the same is true of Congress), it is found indispensable, in order that certain necessary work may be done, that provision should be made for departing, upon occasion, from the regular order of business, and of waiving the enforcement of the ordinary rules of debate. This is done by voting to suspend the rules; and by unanimous consent the houses are able at almost any time to do practically anything that they may desire to do, any standing order or rule to the contrary notwithstanding. It is usually provided that a suspension of the rules may be voted by not less than two thirds of those present, and it is sometimes provided that a motion

to obtain unanimous consent to do something out of the regular order may be made only upon certain days of the week or month.

In most of the houses of legislature there exists a committee known as the "Committee on Rules," which is empowered to sit at any time and to report at any time and which has the authority to bring before the house to which it belongs reports recommending that certain measures be taken up at once, or at some specified date, and be debated for a certain length of time, at the expiration of which time a final vote shall be taken upon the matter under discussion. These resolutions from this committee sometimes fix how the time that is allowed for debate shall be apportioned among those who approve and those who disapprove the measure to which the resolution refers, and even determine whether or not the measure shall be open to amendment. These resolutions can be adopted by a simple majority vote, and thus it is placed within the power of the political party that controls that majority to determine just what measures shall receive discussion, in what form, and for how long. In other words the necessity for obtaining a two-third vote to suspend the rules or a unanimous consent to do something outside of the regular order, is obviated. It will thus be seen that the Committee on Rules is a most important one, and care is always taken to appoint upon it the leading parliamentarians of the dominant political party. Upon this and all other committees, the party in power always has a majority of members, and the chairmanships of the committees to which the more important bills are referred, are eagerly sought for. The system of committees that has been described above is one quite different from that which exists in the English Houses of Parliament and in some of the European legislatures. Different from both the American and the English legislative methods, is the commission system of the French Parliament.

**Powers of  
the Com-  
mittee on  
Rules**

**Control by  
the Majority  
Party**



**Relation of  
Governor  
and Legis-  
lature**

In the opening paragraphs of this chapter, the relation that exists between the Governor and the legislature was described. The central feature is that these two branches of the governments of the states are separate and very largely independent in their action. Neither one looks to the other as the source of its important powers, and neither is able to control the exercise by the other of those powers that it receives directly from the Constitution. So far as the Governor and other executive organs receive their powers by statutory grant from the legislature, that body may of course determine what these powers shall be and by whom they shall be exercised, even if it is not able to hold these officials politically accountable for the manner in which they exercise the discretionary powers with which they have been vested. Upon the other hand, none of these executive officials has any direct constitutional means of influencing the legislature, and the Governor himself is in the same condition of impotence except in so far as he may exercise the veto power. Any influence that he may exert upon the legislature must be an indirect one, namely, by appealing to the public opinion of the people at large who will make their wishes known to their representatives in the legislature, or by written messages to the legislature appealing to their reason and patriotism, or, most effective of all, by "pulling the strings" of the party machinery, in the control of which his influence is frequently very considerable if not absolutely controlling.

**Budgetary  
Reform**

There is to be observed, however, in many of the states a tendency to increase the influence of the Governor in matters not only of administrative control but of legislative policy. In another chapter the relation of a budgetary system of financial administration to representative government is discussed. The movement to introduce budgetary methods in the states is under way and already has made considerable progress. The inevitable result

of this movement will be to increase the influence of the executive.<sup>1</sup>

#### TOPICS FOR FURTHER INVESTIGATION

The Vanishing Powers of the States.—For references, see below p. 483 n.

Recent Improvements in State Administration.—Matthews, *Principles of State Administration*, and references; *The American Year Book* (1913–1919); recent notes in the *American Political Science Review*.

State Finance.—Adams, *The Science of Finance*; Plehn, *Introduction to Public Finance*; W. F. Willoughby, *The Movement for Budgetary Reform in the States*; Agger, *The Budget in the American Commonwealths*.

The Veto Power.—Fairlie, "The Veto Power of the State Governor," *American Political Science Review*, Vol. XI, p. 473 (1917); Finley and Sanderson, *The American Executive and Executive Methods*; Mason, *The Veto Power*; Rogers, "The Power of the President to Sign Bills after Congress Has Adjourned," *Yale Law Journal*, November, 1920.

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<sup>1</sup>See especially the volume by W. F. Willoughby, *The Movement for Budgetary Reform in the States*, published in 1918.

## CHAPTER XXIII

### LOCAL GOVERNMENT

ALL States of any considerable size have found it necessary to divide their territories into smaller areas and to provide especial governmental agencies for them.<sup>1</sup> In most cases, this process of territorial subdivision has been carried through several stages, the entire national domain being first divided into a comparatively small number of areas, and these in turn divided into smaller parts, and these again into still smaller districts. Thus in France we have first the great Departments, eighty-six in number; then the *Arrondissements* (before the War, three hundred and sixty-two in number); and finally the Communes of which there are in all about thirty-six thousand. In Prussia, there are the Provinces, the Government Districts, the German City Circles (*Kreis*), and the Rural Communes. In the states of the American Union we similarly have the Counties and the Towns or Townships.<sup>2</sup> Besides these local government areas we also find in many States special

The sub-  
divisions  
of States

<sup>1</sup>"Local assemblies of citizens constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty."—TOCQUEVILLE.

<sup>2</sup>On local government in France, see Garner, "Administrative Reform in France," *American Political Science Review*, Vol. XIII, p. 17 (and references), and Sait, *Government and Politics of France* (and references); on Prussia, see Ogg, *The Governments of Europe* (and references); on England, see Lowell, *The Government of England*; Goodnow, *Comparative Administrative Law*; S. and B. Webb, *English Local Government*; Redlich and Hirst, *Local Government in England*; on the United States, Goodnow, *Administrative Law of the United States*; Fairlie, *Local Government in Counties, Towns, and Villages*; *Constitutional Convention Bulletins* (Illinois, 1920); Gilbertson, *The County: The Dark Continent of American Politics*.

Discussions of general interest are Bryce, *Modern Democracies*; Ashley, *Local and Central Government*; Munro, *Government of European Cities*; Sidgwick, *Elements of Politics*; and Lieber, *Civil Liberty and Self-Government*.



administrative districts for special purposes, as, for example, public sanitation, school administration, etc., the boundaries of which do not coincide with any of the other political subdivisions. Finally, it may be said, the colonies and other dependencies of a State, which always have governments of their own, are in a sense local government areas; and, indeed, the member states of a federal union may be similarly regarded. These types however, present problems of their own, independent of questions of local government.

Federalism  
and Empire

Historical forces have played a considerable part in determining not only the boundaries of local government areas, but the powers vested in the hands of the governing organs. In other words, it has not always been a matter which the central government could freely determine upon a basis of administrative expedience, just what should be the character of its local government system. Thus we have in the different States of the world a variety of arrangements which have been due only in part to differences of opinion as to how the best results may be obtained, or even to the peculiar political, economic, and geographical conditions existing in these States.

Forces de-  
termining  
boundaries  
and powers

Generally speaking, however, so far as the matter has been one of deliberate choice, we find that the reasons which have led to the establishment and maintenance of local governments may be summarized as follows:

First, the necessity of lightening the burden of duties of the central government.<sup>1</sup>

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<sup>1</sup>The problem of lightening the duties of the English Parliament is being discussed at the present time. Separate legislatures for Scotland and Wales and imperial federation are linked with the question of devolution. "Devolution is advocated to-day in order to relieve the Imperial Parliament of work which it cannot perform and to make legislation a more accurate reflection of the common will. It is part of a nationalist claim for liberty. That is but a small part of the case. Devolution is required in order that the citizen may keep in touch with his Government and may feel, through a gradation of widening groups, an identity with his Government. Each sphere of political contact has to be organized and endowed with appropriate powers; if any one be neglected the whole system is like a broken nervous system, and suffers from paralysis." Macdonald, *Parliament and Democracy*, pp. 72-73. See also S. and B. Webb, *A Constitution for the Socialist Commonwealth of Great Britain*.

Second, the desire to secure more efficient administration of government by providing the means whereby the peculiar needs of different localities may be determined and satisfied.

Third, the desire to realize more fully the aim of self-government by allowing the people to participate more directly in the control of their own affairs than would be possible if all authority were concentrated in one government, maintained at the capital of the State.

Lightening  
duties of  
Central  
Government

With regard to the necessity of lightening the duties of the central government, but little needs to be said. Not in governments only but in all other organizations, when the work to be done becomes considerable in amount, it is necessary that certain of its details be handed over to subordinate administrative bodies; and the more complex and numerous the duties to be performed by the organization as a whole, the more necessary becomes this allotment of work. Especially during recent years has the increase of governmental activities made it indispensable that they be handed over, in part, to special agencies: the legislature delegates its power to administrative commissions and, in order to be able to deal intelligently with technical matters, relies for advice more and more on extra-governmental conferences of experts. President Taft's Commission on Economy and Efficiency, President Wilson's Industrial Conferences, and the English Royal Commission on the Coal Mines are illustrations of this tendency.

Special  
instrumental-  
ities

When confronted by the necessity of creating special instrumentalities for the enforcement of its laws or for the administration of particular services which it has assumed, the central government has two alternatives. It may either divide the entire domain into special administrative districts—into school districts, if the matter be one of education; into sanitary districts, if it be one of public hygiene, etc.—or it may use for the purpose already existing local areas. When the latter alternative is selected, it may

either empower or direct the governmental agencies of those areas to attend to the matter in question or provide a new set of organs and officials for the purpose. Other things being equal, it is desirable that an administrative system be kept as simple as possible, and therefore, that new administrative areas or organs or officials be not created unless necessary; but in many cases, for special reasons, this is not practicable. In some cases, these reasons are historical, or political in character. More often, however, they are technical; that is, the special function to be performed is one which is of such a special character that existing local officials cannot be expected to have the training or knowledge needed for its efficient exercise. Then, also, it may be that there are reasons why the central government desires to keep within its own hands a stricter supervision and control of the matter than it could possibly exercise if it should employ any of the existing local government areas.

Political and  
technical  
problems

Thus it has come about, in some cases unnecessarily, in others justifiably, that in practically all large States—and especially in Great Britain and the United States—the systems of local government have become very complicated. In addition to what may be termed the ordinary local government districts, there exist a large number of special administrative areas, the boundaries of which may or may not coincide with each other or with those of the chief local subdivisions.

Turning now to the second of the reasons which have led to the establishment of local governments, it is seen that the matter is still one of administrative efficiency, but the moving consideration is not so much to lighten the tasks of the central organization as it is to provide the means whereby the special or peculiar needs of particular localities, or it may be the special and peculiar wishes of their inhabitants, can be determined and satisfied. These considerations are, of course, especially important when the

Meeting  
special  
needs of  
a locality



different portions of territory present wide divergencies in social or economic conditions, or contain populations that have different standards of living. By establishing for these areas governments with discretionary powers with reference to purely local conditions, it is possible to satisfy the different local needs and popular desires without diminishing the autonomy of the central government to regulate those interests that concern the whole State.

Local and  
general  
interests

It hardly needs to be said that no hard-and-fast line can be drawn between local and general interests. The line of division will vary in different States, and within the same State will vary at different times. Thus, for example, in the states of the American Union, altered circumstances have, within recent years, made expedient the withdrawal from exclusive local regulation and the assumption of state-wide control of such matters as education, highways, water supply, sanitation, the sale of intoxicating liquors, and in individual cases, the care of the defective or delinquent classes.

Twofold  
status of  
local  
agencies

The fact that the central government often makes use of local governing agencies for the enforcement of its own laws, gives to these agencies a twofold status: as purely local governing bodies with more or less autonomous powers, and as administrative agencies of the central government. The existence and nature of this double character is one always to be borne in mind, for it has not only considerable legal significance, but administrative importance as well. Upon the legal side the significance appears, for example, when an individual seeks to recover monetary damages for a legal wrong done to him by an agent of the local government. If this arises out of an official act, committed in connection with the performance of a purely local matter, the local government can be sued in its character as a corporation. If, however, the wrong arises out of an act of the local government while functioning as an agent of the central government,

the local agency cannot be held responsible under the doctrine of public law that a sovereign body politic is not amenable to suit without its consent.<sup>1</sup> In either case, however, the official at fault can be proceeded against personally, and damages, if assessed, collected out of such property as he may happen to possess. But this is a very meagre safeguard for the citizen, whose desert would seem to be the same in either case.

From an administrative point of view, the distinction that has been spoken of is of great importance, since it is necessary that the central government should exercise a more direct supervision and control over officials acting as its own agents than are needed or expedient with reference to those same officials when acting as agents of the local government. In the United States there has been much discussion as to the extent to which what is called "home rule" should be granted to cities, especially with reference to the forms of government to be maintained by them; and not a little bad reasoning has been indulged in due to the failure to appreciate that, so far as these cities act as agents of the state and not as purely local governing bodies, it is necessary and proper that they should remain under the direct control of the central governments of the states in which they are located.

With reference to purely local matters, however, it is often advantageous for the central government to fix certain standards to which the local areas can be compelled to conform. The effect of prescribing such standards is to leave the local governments free to act as they will so long as they observe the conditions imposed. Within the limits thus marked out they are autonomous. If these standards are in themselves such as relate to efficient and honest and impartial government, the limitations they impose should not be deemed irksome or in negation of the principles of local self-government. Thus

Certain  
standards  
fixed by  
central  
authorities

<sup>1</sup>See above, p. 397.

it seems but reasonable that the central government should provide that local taxes may be levied only for local purposes, and that they shall be assessed and collected in a way that will guarantee that their burden will fall equitably and uniformly upon the inhabitants of the local area; that local debts shall not be increased beyond a certain amount or without adequate provision being made at the same time for their ultimate payment.

Official  
authority

The authority that the higher officials of a government have over their subordinates may be exercised in two ways: by issuing administrative orders which those to whom they are directed are under a legal obligation to obey—an obligation that may be enforced either by the removal of the offenders from office or by subjecting them, for failure, to such penalties as the laws provide; or, secondly, by having recourse in the first place to the courts and obtaining writs of a mandatory or prohibitory character ordering that certain acts be or be not done. The first mode is termed administrative or bureaucratic and the second judicial. These modes of control apply as well to the exercise of the authority of the central governments over the local governments which they create.

Administra-  
tive and  
judicial  
methods of  
control

Under the most favorable conditions, the judicial method of control is an ineffective one as compared with the administrative method. Under it an administrative superior, lacking the power of direct control, must obtain from a court a writ of mandamus against the recalcitrant one to secure affirmative action or restraining writs of prohibition or injunction, or writs of *quo warranto* or *certiorari* to determine the authority that a public officer claims to exercise. The system of judicial control also means that, where private individuals conceive themselves to be injured, or their rights threatened by the acts of public officials, they may have resort to the ordinary courts for relief or protection. In all cases, moreover, under this system, the courts will not attempt to judge the wisdom



of the administrative acts involved; they will examine them only as to the question of legal competency, and in no case will they attempt to control the manner in which public officials may see fit to exercise the discretionary authority that the law gives to them. Their writs can therefore be used only in case dishonest or clearly *ultra vires* acts are committed.

There is no safeguard in case of official incompetency or any other form of maladministration short of an actual violation of law. And even when judicial control is applicable, to be at all effective, there is presupposed the existence of a system of state courts presided over by intelligent, upright, and fearless judges, aided by honest and alert public prosecutors. And in addition there must of course exist a body of laws that clearly define private rights of person and property and fix the legal competency of all public officials.

The executive method of control by the central government over local authorities is not necessarily alternative to the judicial method, but may be supplementary to it. That is to say, the responsibility to the courts of local officials for all their acts may exist, and, in addition, there may be vested in the central government the authority to remove them from office wherever the good of the locality or of the State seems to demand that this be done.

The right of executive removal of local officials is one that of course may be misused, but it is practically impossible absolutely to guard against this contingency with regard to any power whatsoever. If the attempt be made to devise a government with its powers so limited or their exercise so shackled that arbitrary or misguided action is impossible, the inevitable result is that all effective authority and energy are destroyed and the government rendered incapable of realizing the primary ends for which it is established. The art of true constructive statesmanship lies in the provision of forms and methods of government

**Ineffective-  
ness of  
Judicial  
method**

**Executive  
method**

Removal of  
officials

which will operate to hold those in authority politically and legally responsible to those whom they govern, not in denying them any real discretionary powers. With reference specifically to the right of the central executive to remove local officials, it would therefore be proper to require that when the right is exercised, the grounds should be stated and possibly specific charges made, and an opportunity given to the accused to show, if he can, that the charges have not a basis of fact. But in any event, the process of removal should be a fairly summary one, and the final decision in the central executive official. As regards the selection or appointment of local officials, there are several alternatives. All may be appointed by the central authorities; all may be locally elected; or the chief local officials may be centrally appointed, and the lesser officials either locally elected or appointed by the chief local official.

Jurisdiction  
of local  
bodies

One further point needs to be made with reference to the powers that may be granted to local governing bodies. The legal principle may be adopted that they shall be competent to deal only with those matters that have been specified in the law or laws creating them; or that they shall have general authority to act with regard to all matters of local concern, subject of course to restraint by the central government in case they attempt to act with reference to matters which the central government deems not to be primarily local in character.

In England and the United States the constitutional principle is adopted that the local governing areas are held to have only those powers of government and control that have been specifically given to them by the central government either in the form of special charters or according to the terms of some general local government acts. In France, Prussia, and indeed in European countries generally, the rule is that the powers of the local bodies are not enumerated but that they extend generally to all

matters which in substantial fact may be said to be of purely local concern.

In this respect, then, the European system would seem to provide a more liberal form of local self-government than exists in England and America. In fact, however, this is not the case, because while the continental sphere of local action is broader, the manner in which the local powers are exercised is much more strictly supervised and controlled by the central authorities than is the case in England and America. Thus, it is very commonly the case that in the European States the local authorities look to and are guided by the will of the central authorities even as to matters of purely local concern. In England and the United States, upon the other hand, the local authorities, when acting within the limits defined for them by law, are free not only from control but even supervision by the central government. The only check upon them is through the courts, and this can be applied only when there has been a violation of positive law. In Europe, as contrasted with this, the central control is continuous and drastic, and is exercised by administrative orders, obedience to which can be compelled either by removal of the recalcitrant official or by other summary means.

It is, however, to be said that in England since the establishment in 1871 of the Local Government Board as a central administrative organ, the acts of local officials, even within the limits of their legal powers, are subject to a certain amount of control that is administrative rather than judicial in character. This applies especially to the matters of poor-relief, local finance, and public health. Furthermore, through the making of what are known as "grants-in-aid," the central government has within recent years greatly increased its control over local authorities. These grants are sums of money appropriated from the central treasury for local purposes, but contingent upon certain things being done and certain standards main-

Local self-  
government

Control  
of local  
affairs by  
appropria-  
tions

tained by the local authorities of the areas concerned. Thus while there is no legal compulsion applied, the result is that the localities being anxious to obtain the benefits of the grants are willing to meet the conditions upon which the giving of the grants is made contingent.

**Minimum  
of central  
control in  
United  
States**

It is probably in the United States that the minimum amount of central supervision and control exists, with a resulting amount of administrative inefficiency. And what makes the conditions worse is the fact that the governing authorities in the several local government districts are not so related to one another that they constitute a systematic machinery of government. Thus, for example, in the counties there are a considerable number of officers each popularly elected, each with certain specified duties to perform, but none compelled to coöperate with the others, or owing obedience to a common administrative local superior. In each of the counties there are Boards of Supervisors or Commissioners, but these Boards have little power to control the actions of the elected county officers.

One serious objection to the English and American practice of permitting local governments to exercise only those powers that have been specifically given to them is that whenever it is necessary or desirable that a local government shall do a certain thing that has not been specified in advance, it is necessary to go to the central legislature for its permission. This is not only a difficult process, and one requiring considerable time, but opens the way to corrupt influences; and, at best, this "special legislation", as it is called in the United States, produces confusion and complexity. To a considerable extent these evils have been avoided in England by the use of executive "Provisional Orders" which are later approved by the legislature, and by the adoption of a special procedure for the "private" bills, which relate to particular localities. With reference to the continental practice, it should have been said that in

**Provisional  
Orders**



many cases the local bodies before exercising their "general" powers have to obtain the approval of the central administrative authorities.

Thus far the subject of local government has been discussed from the standpoint of administrative efficiency and convenience. We now turn to the third consideration. This, as has been said, has operated as a motive for the establishment of local governing bodies. This consideration also relates to the means thus provided of giving to the governed a more direct and effective participation in their own government.

Direct participation of people in own government

The establishment and maintenance of local governments will not provide self-government unless the local organs, whether elected by the people, or appointed by the central authorities, are subject to the control of the people of the locality as regards the policies that they pursue. This is the important point, for locally elected local officers may in fact be subject to strict control, as regards their policies, by the central government; while, on the other hand, local officers, appointed by the central authorities, may nevertheless be free to guide their policies by the special interests or desires of the people subject to their jurisdiction.

Local self-governing bodies may take the form either of locally elected administrative officials and representative assemblies with limited legislative powers or, as is most usually the case in the smaller or less populous areas, of locally elected administrative and judicial officials without any attempt to create local legislative bodies. Thus in the individual states of the American Union, which it is quite proper to consider as the first great division of the national domain for the purpose of providing local self-government, we find complete systems of government with legislative as well as executive and judicial branches. In all the lesser areas, however, into which the states of the Union are divided, we find no provision made for local

Complete systems in larger subdivisions

Common  
councils  
in cities

legislatures except in the larger cities, with their "common councils," and in the "towns" of a few of the states in which all the qualified voters annually assemble for the exercise of directly democratic functions. But in all the other local subdivisions, that is, in the counties into which all the states are divided and, in almost all the states, in the towns and the other smaller districts into which the counties are divided, local self-government takes the form of the election by the peoples of these localities of officials for the regulation of those interests that are wholly local in character. And, it may be further observed that, where local legislative bodies exist, they have what may be called ordinance-making rather than truly legislative powers.

Ordinance-  
making  
bodies

Thus in all cases the local governing organs which exist in the American states (and the same is true of all other great states) derive their legal powers from, and have their jurisdictions limited and determined by, the central authorities of those states. And, as thus defined, these powers extend only to the exercise of local administrative matters. They do not include the right to establish laws defining private rights of person and property. These local authorities may issue police and other administrative orders which, of course, affect and control the exercise of property and other personal rights by the individual, but they are never permitted to determine in any truly legislative manner what these rights shall be, whether of contract or tort, whether relating to the ownership, use, and disposal of real and personal property, or to the rights and liabilities that spring out of all the various forms of family and other personal relationships. This, the general field of the private law, is reserved for the law-making organs of the central governments of the states.

It is also interesting to observe that in England, where self-government in its modern forms first found its origin, it was not until 1888 that the people of the counties had

any voice in the selection of the officials by which their local concerns were administered. County government was largely in the hands of the Justices of the Peace, who were appointed by the Crown upon the nomination of the Lord Chancellor. It is, however, to be observed that these Justices were unpaid and were residents of the counties in which they officiated, and were, therefore, identified with local interests. By the Local Government Act of 1888 provision was made for locally elected County Councils to which were transferred most of the administrative powers of the Justices; and by the Act of 1894 elective councils were also provided for smaller urban and rural districts. These councils, however, act largely through committees, and, like the Justices of the Peace, have administrative rather than legislative powers. Furthermore, along with this introduction of the elective principle in English local government has gone a fairly rapid increase in the supervision exercised over all local governments by the central government.

County  
Government

This control is exercised not only directly through the operation of general laws, but indirectly through the practice of granting what are termed "grants-in-aid." These grants are in the nature of subventions to the localities from the central treasury for certain purposes and upon certain conditions, as, for example, that additional amounts be locally raised, and expended in certain ways. In this way the central government is able not only financially to assist the local bodies, but to secure the action of those bodies in certain prescribed ways and for certain prescribed purposes. At the same time there is no compulsion and the autonomy of the local authorities is not interfered with. In the United States this method is sometimes pursued by the states with reference to their own local governments, and the Federal Congress has made appropriations to aid the states in the construction by them of good roads, upon condition that the states themselves expend from their

Grants-  
in-aid



Subdivi-  
sions in  
France

own funds amounts equal to or greater than those received from the national treasury, and that the national government be allowed to exercise a certain amount of supervision over the expenditure of these sums. Other instances of federal aid thus extended to the states could be mentioned.

In France, as has been said, the chief administrative subdivisions are the Departments, of which there are eighty-six. The Departments are subdivided into three hundred and sixty-two *Arrondissements*, and these in turn into over thirty-six thousand Communes. The chief executive official of the Department, the Prefect, and other subordinate officials are appointed and removed nominally by the President, but in fact by the Minister of the Interior. There is also in each Department a representative assembly (*conseil général*) locally elected. This body has, however, few powers, and its acts may be vetoed by the central government.

The head of the *Arrondissement* is the Sub-Prefect, who acts as the agent and subordinate of the Prefect of the Department in which the *Arrondissement* is situated. To assist him there is a locally elected *conseil d'arrondissement*, which, however, has very little power. The *Arrondissement* is in fact a very unimportant local government area. "Since the *Arrondissement* has no corporate personality, no property, and no budget, the council possesses but a single function of importance, that, namely, of allotting among the Communes their quotas of the taxes assigned to the *Arrondissement* by the general council of the Department." <sup>1</sup>

The  
Communes

The thirty-six thousand Communes constitute the true local self-government areas of France. They vary in size from areas with less than a hundred population to some containing large cities with more than a quarter of

<sup>1</sup>Ogg, *The Governments of Europe* (1st. ed.), p. 348. The *Arrondissement* has had some political importance as the electoral district for members of the Chamber of Deputies. The Cantons, of which there are nearly three thousand, are not local government areas, but are simply electoral and judicial units.



a million people. Each Commune has a locally elected council which gives advice to the higher administrative officials and may also initiate proposals regarding a carefully enumerated number of local matters, which proposals, however, to be put in force require the approval of the Prefect or other higher administrative authority. The executive head is the Mayor, who is elected by the council from among its own members. He may be suspended from office by the Prefect or Minister of the Interior, or removed from office by the President. "The powers which he exercises vary widely according to the size and importance of the Commune. But in general it may be said that he appoints to the majority of municipal offices, publishes laws and decrees and issues *arrêtes*, or ordinances, supervises finance, organizes and controls the local police, executes measures for public health and safety, safeguards the property interests of the Commune, and represents the Commune in cases at law and on ceremonial occasions."<sup>1</sup> The local government systems of Italy, Spain, Belgium, and Holland closely resemble that of France.

Their  
jurisdiction

The Prussian Provinces (of which there are twelve) serve both as an administrative area for the central government and as a district for local self-government, and these two distinct functions are reflected in the provincial magistracy. The *Oberpräsident*, appointed by the King, and a small council, in part appointed and in part locally elected, have had charge of the local enforcement of matters of general interest to the whole State. For the management of the distinctively local concerns there is a Provincial Assembly, the members of which are elected by the assemblies of the Circles (into which the Provinces are divided); and a local executive head (*Landeshauptmann*), elected by the Assembly, almost always from among its own members. The Provincial Assembly (*Landtag*) has a broad competence, but its acts have required the approval

Prussia

<sup>1</sup>Ogg, *op. cit.*, p. 350.

Diversity of  
forms

of the King or of his ministers, and it could be dissolved by the King. In the Circles, also, the governing authorities consist of a double magistracy, the officials of the one class having charge of the local administration of general state interests, and the others looking out for purely local affairs. It will not be necessary to describe these organs, but, in general, it may be said that they correspond fairly closely with those found in the Provinces. A satisfactory description of the governments of the Prussian Communes is impracticable since there is a very great diversity of organization in the different Communes. It may be said, however, that in all of them there is an elected chief magistrate, and in most cases an elected council.

In further comparison of the local government systems of France, Prussia, and England with reference to the amounts of local autonomy enjoyed by the local officials we may quote the following:

Local  
autonomy

The [French] Prefect is primarily a central agent; his concurrence is required for the validity of many resolutions taken by the department Council-General, or he must reserve them for consideration by the Ministry at Paris; he has to decide, or obtain a decision, upon questions not merely of legality, but of expediency, and his own view of expediency will naturally be determined by the views of the Ministry, upon whom his position depends.

A more curious situation is that occupied by the Prussian *Landrath*. He is appointed by the Crown on the nomination of the Circle Assembly, which pays his salary; but in his added character of a central agent he can be suspended or dismissed by his superiors in the bureaucratic hierarchy. Consequently, as his career and chances of promotion are determined mainly by the approval of those superiors, he is anxious to avoid any conflict between the two masters whom he has to serve; and should a dispute arise he will naturally side with the central government—in fact, it is understood to be his duty to do so.

The indirectly elected lay members of the Circle Committee also, so far as they are entrusted with "central" functions, are subject to the same administrative control; but as they are not members of the bureaucracy, they cannot be dismissed from office save by the decision of an administrative court. In the

same way the Burgomaster and other members of a town magistracy and the head man (*Vorsteher*) of a country commune, in Prussia, can be removed from their posts only by a similar decision. On the other hand, a French Mayor, if he fails to carry out properly any duty devolving upon him at law or laid upon him by the central government, can be suspended for one month by the Prefect, or for three months by the Minister of the Interior, or finally dismissed by presidential decree. He is therefore much less protected than his Prussian colleague against arbitrary action by the central offices.

In England if the elected councils come into conflict with the central departments in any way, either for exceeding the law or for neglecting or deliberately refusing to carry out its requirements, almost the only thing which the central authority can do is to call in the aid of the courts of justice.<sup>1</sup>

That Englishmen and Americans should have adopted the systems of local government which they have, is explainable very largely by the historical fact that many of their local government areas were originally autonomous or wholly independent bodies-politic over which the central or national government was able only gradually to extend its authority and control. Thus, these local areas, while loyally recognizing and desiring the existence of a strong central government for national purposes, looked upon self-government with regard to local matters as a "right" to which they were justly and rationally entitled, and not as a gift or concession from the central government.

In France and Prussia, on the other hand, the central authority developed under conditions which made it unnecessary to consider the claims of the smaller areas to autonomous rule, with the result that the earlier local governing bodies were crushed out of existence. When the burden of administration, therefore, became too great for a single centralized government, new areas for local administration had to be artificially and arbitrarily created. And, this being the nature of their origin, it is but natural that the status of the governing bodies established in them

Historical  
explanation  
of English  
and  
American  
systems

France and  
Prussia

<sup>1</sup> Ashley, *Central and Local Government*, p. 338.



should be different from that, for example, of the counties in England.

Self-  
determina-  
tion of local  
interests

The local-governing areas that exist within the states of the American Union were, in most instances, artificially marked out and created by the central authorities of those states, but in all cases this was done only after the principle had become well established in American political philosophy that, so far as practicable, each locality is entitled, as a moral right, to have its purely local interests determined by its own inhabitants, and satisfied according to the methods that they may think best. The result has been the carrying into practice in the American states of many of the same principles, and much of the same spirit as are found in English local government bodies.

Federal and  
unitary  
States

In a very true sense the states of the American Union provide a form of local self-government, but of course these commonwealths have a constitutional status that distinguishes them from the autonomous local governing areas of such unitary states as England, France, or Prussia. Not only are the discretionary powers of the American states much broader than those granted to local governments strictly so called, but, in the exercise of those powers, they are not subject to any control by the central government except in so far as the rights of that government are affected or rights of private individuals invaded in violation of specific provisions of the National Constitution. And, furthermore, these autonomous rights of the states are constitutionally guaranteed: they do not rest upon mere statutory enactment and are not therefore subject to change or annulment by the national legislature. A federal system of government is, therefore, one which, constitutionally as well as practically, is quite a different system from that of a unitary state which grants wide powers of local self-government to its administrative areas. It is one which, as will be pointed out, necessarily weakens the central authority and, in many ways, inter-

feres with administrative efficiency. It possesses certain advantages, but it is not one to be established unless historical or other accidental circumstances make it necessary.

The only merits that the American system of administrative and local government control is supposed to have are that it prevents the growth of rigid bureaucracies which are out of touch with and often disregardful of the wishes and interests of the people, and that it tends to give to private individuals a reasonably secure protection against arbitrary and oppressive acts upon the part of their rulers. The first result is probably secured, although at the expense of considerable administrative inefficiency, but it is very doubtful indeed whether, in actual practice, private rights are any better secured in America than they are under the systems of administrative centralization and of administrative courts that exist in France and Prussia.

Merits of  
American  
System

A final question with regard to local government is as to its constitutional status in the different countries of the world. As to this it may be said that it would seem that there is no real necessity that local governing bodies should be given a constitutional as distinguished from a legislative foundation. That the subject should not be mentioned in the Constitutions of the United States, Switzerland, and the German Empire is to be expected since these instruments deal only with matters of federal concern, leaving the subject of local government to the member states to regulate as they see fit, whether by constitutional or ordinary statute law. But in the constitutions of the unitary States of France, Italy, and Japan we find a similar complete absence of any provisions regarding Local Government.

Constitutional  
status of  
local  
governments

Article 105 of the Prussian Constitution provided that "The representation and administration of the communes, circles, and provinces of the Prussian State shall be determined by special laws." The Constitution of Belgium enumerates the provinces and provides that, "if there

should be occasion for it, the territory may be divided by law into a greater number of provinces." (Art. I.) With regard to the government of local areas, Article 103 declares:

#### In Prussia

Provincial and communal institutions shall be regulated by law. The law shall establish the application of the following principles:

(1) Direct election, except in cases which may be established by law with regard to the chiefs of the communal administration and government commissioners acting in the provincial councils.

(2) The relegation to provincial and communal councils of all provincial and communal affairs, without prejudice to the approval of their acts in the cases and according to the procedure determined by law.

(3) The publicity of the sittings of the provincial and communal councils within the limits established by law.

(4) The publicity of budgets and of accounts.

(5) The intervention of the King or of the legislative power to prevent provincial and communal councils from exceeding their powers and from acting against the general welfare.

#### In the United States

Some of the constitutions of the several states of the American Union are silent with regard to local government, thus leaving the matter wholly to legislative determination.<sup>1</sup> Others have a few general provisions dealing, for the most part, with boundaries of the counties, the location and removal of "county seats," authorizing the laying out of highways by the counties, limiting the amount of indebtedness they may incur, and providing that whatever system of county government is established by the legislature shall be uniform throughout the state.

Some of the constitutions, however, declare what county officers shall be elected, their terms of office, etc. Thus the constitution of Oregon provides (Art. VI, Sections 6-9):

<sup>1</sup> For a discussion of this matter, see Holcombe, *State Government in the United States*.



There shall be elected in each county, by the qualified electors thereof, at the time of holding general elections, a county clerk, treasurer, sheriff, coroner, and surveyor, who shall severally hold their offices for the term of two years.

Such other county, township, precinct, and city officers as may be necessary, shall be elected or appointed in such manner as may be prescribed by law.

No person shall be elected or appointed to a county office who shall not be an elector of the county; and all county, township, precinct and city officers shall keep their respective offices at such places therein, and perform such duties as may be prescribed by law.

Vacancies in county, township, precinct and city offices shall be filled in such manner as may be prescribed by law.

In the constitution of Pennsylvania the county officers are enumerated and their election provided for, with the further provision:

The compensation of county officers shall be regulated by law, and all county officers who are or may be salaried shall pay all fees which they may be authorized to receive, into the treasury of the county or state, as may be authorized by law. In counties containing over one hundred and fifty thousand inhabitants all county officers shall be paid by salary, and the salary of any such officer and his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term and collected by him or for him.

The General Assembly shall provide by law for the strict accountability of all county, township, and borough officers, as well as for the fees which may be collected by them as for all public or municipal moneys which may be paid to them. (Art. XIV, Sections 6-7.)

The constitution of the state of Washington has the special provision (Art. XI, Sec. 9) that "no county or the inhabitants thereof, nor the property therein, shall be released or discharged from its or their proportionate share of taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatever."

In very few of the constitutions of the American states is the attempt made to endow the local governments with specific powers. The granting of these powers is thus left

Provisions  
of American  
state con-  
stitutions

Financial  
liability

**The Police  
Power**

to statutory determination. In some few instances, however, it is stated that the local bodies shall have police powers within their several limits. Thus the constitution of Washington provides that "Any county, city, town, or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with the general laws." (Art. XI, Sec. 11). And the constitution of California declares that "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Art XI, Sec. 11). It also goes on to provide that the local governments exclusively shall have the power of levying and collecting taxes for purposes purely local to their several areas, and that no such local subdivision may be released from paying its proportionate share of the taxes levied for state purposes. There are also several other less important local government provisions.

**Government  
of cities**

The government of cities is considered in the United States as a subject distinct from the general matter of local government, and in many of the constitutions of the several states there are provisions fixing the classes into which the cities of different sizes may be grouped, the general character of the governments which they may establish, and the extent to which their rights of self-government within these limits may not be infringed by ordinary legislative acts.<sup>1</sup>

**Conclusion**

In conclusion of our discussion of the general problem of local government we cannot do better than to quote a paragraph from the chapter in John Stuart Mill's essay on *Representative Government*, in which he discusses "Local Representative Bodies."<sup>2</sup> Nowhere else that we know of is the whole matter so well summed up as in these sentences, written half a century ago.

<sup>1</sup> See Munro, *The Government of American Cities* (rev. ed.), and references.

<sup>2</sup> Chapter XV

In details of management . . . the local bodies will generally have the advantage; but in comprehension of the *principles* even of purely local management, the superiority of the central government, when rightly constituted, ought to be prodigious; not only by reason of the probably great personal superiority of the individuals composing it, and the multitude of thinkers and writers who are at all times engaged in pressing useful ideas upon their notice, but also because the knowledge and experience of any local authority is but knowledge and experience confined to their own part of the country and its modes of management, whereas the central government has the means of knowing all that is to be learnt from the united experience of the whole kingdom, with the addition of easy access to that of foreign countries.

The practical conclusion from these premises is not difficult to draw. The authority which is most conversant with principles should be supreme over principles, while that which is most competent in details should have the details left to it. The principal business of the central authority should be to give instruction, of the local authority to apply it. Powers may be localized, but knowledge to be useful, must be centralized; there must be somewhere a focus at which all its scattered rays are collected, that the broken and colored lights which exist elsewhere may find there what is necessary to complete and purify them. To every branch of local administration which affects the general interest there should be a corresponding central organ, either a minister, or some specially appointed functionary under him; even if that functionary does not more than collect information from all quarters, and bring the experience acquired in one locality to the knowledge of another where it is wanted. But there is also something more than this for the central authority to do. It ought to keep open a perpetual communication with the localities: informing itself by their experience, and them by its own; giving advice freely when asked, volunteering it when seen to be required; compelling publicity and recollection of proceedings, and enforcing obedience to every general law which the legislature has laid down on the subject of local management. That some such laws ought to be laid down few are likely to deny. The localities may be allowed to mismanage their own interests, but not to prejudice those of others, nor violate those principles of justice between one person and another of which it is the duty of the State to maintain a rigid observance. If the local majority attempt to oppress the minority, or one class another, the State is bound to interfere.

Mill on  
on local  
Government



## TOPICS FOR FURTHER INVESTIGATION

The English Parliament and Devolution.—*An Analysis of the System of Government throughout the British Empire* (Macmillan, 1912); "The Better Government of the United Kingdom," *The Round Table*, September, 1918; J. A. M. MacDonald, "Devolution or Destruction," *Contemporary Review*, August, 1918; Pim, *Home Rule through Federal Devolution*; J. A. M. MacDonald, *The Case for Federal Devolution*; Ogg, *The Governments of Europe*.

The Regionalist Movement in France.—Garner, "Administrative Reform in France," *American Political Science Review*, February, 1919; Ogg, *The Governments of Europe*; Duguit, *Law in the Modern State*; Sait, *Government and Politics of France*.

Recent Local Government Reforms in the United States.—James, *Local Government in the United States* (1921); *Constitutional Convention Bulletins* (Illinois, 1920); Maxey, *County Administration in Delaware*.

## CHAPTER XXIV

### FEDERAL GOVERNMENT

Importance  
of Federal  
Government

A FORM of government that warrants special treatment, because of its complexity as well as its importance, is that known as Federal Government.<sup>1</sup> It has made possible governmental union for states with extensive territories and different groups unwilling to consent to complete political unity, for it permits uniform, federal regulation of appropriate subjects and self-government in matters which are deemed of prime local importance and which can be cared for by regulations differing according to the wishes of the inhabitants of the political subdivisions. The vast extension of the federal principle has been one of the cardinal facts of the political history of the last half century.<sup>2</sup>

<sup>1</sup>Professor A. B. Hart has a monograph, *An Introduction to the Study of Federal Government* (Harvard University Historical Monographs, No. 2) which is rich in bibliographical material. The work, however, is descriptive and comparative rather than theoretical.

In addition to the authorities which are referred to later in this chapter, the following are worth while: Sir George Cornewall Lewis, *Dialogue on the Best Form of Government* (Cf. *Edinburgh Review*, Vol. CXVIII, p. 138, July, 1863); Bentham, *The Constitutional Code*, Chap. XXXI (Works, Vol. IX); Freeman, *History of Federal Government in Greece and Italy* (2nd. ed., 1893) and *Historical Essays*; H. A. L. Fisher, *Political Unions* (Oxford, 1911); *Westminster Review*, Vol. CXXXIX, p. 573 (May, 1888); *Fortnightly Review*, Vol. XLIX, p. 189 (February, 1888); *Quarterly Review*, Vol. XXXVIII, p. 172 (July, 1828); Madison, *Works*, Vol. 1, p. 293; Washington, *Works*, Vol. IX, p. 521; Lieber, *Manual of Political Ethics*, Book VI, Chap. 2; Maine, *Popular Government*; Mill, *Representative Government*, Chap. XVII; G. B. Adams, "Federal Government: Its Function and Method," in *The British Empire and a League of Peace* (1919).

<sup>2</sup>Sidgwick closed his treatise, *The Development of European Polity*, with the prophecy: "When we turn our gaze from the past to the future, an extension of federalism seems to me the most probable of the political prophecies relative to the form of government." (p. 439). The whole discussion (Lecture XXIX) is of interest. See also Sidgwick, *The Elements of Politics*, Chap. XXVI.

"When Mr. Freeman embarked, in 1863, upon the task of writing the history of Federal Government he could rely for illustration of the principle upon three—and only three—conspicuous instances among the States of the modern world: the United Provinces of the Netherlands, the Swiss Confederation, and the United

International  
Unions

The association of states with one another in order to attain certain ends is a matter of frequent occurrence, but where this does not lead to the establishment of central organs of government with considerable executive and legislative powers of their own, the association forms a subject of international rather than of constitutional law. Of this international type are the administrative unions, of which the International Postal Union is the best example, and the different alliances into which two or more states enter for military or commercial purposes.<sup>1</sup>

Constitutional  
Unions

From the technical standpoint of analytical jurisprudence, it is, perhaps, correct to say that whenever the member states of a union remain severally sovereign and therefore united to one another by a treaty rather than by strictly legal bonds, the union falls outside of the interest of students of constitutional government. In this discussion, however, we shall be justified in giving some attention to unions of this treaty type, if only for the purpose of distinguishing them from unions which may properly be termed constitutional. The two main types of "composite" states are known as Confederations or Confederacies and Federal States, the corresponding German terms being *Staatenbunden* and *Bundesstaaten*.<sup>2</sup>

Nature of a  
Confederacy

In a confederation, the member states retain their full sovereignty and legal independence and, strictly speaking, no central State is created. There is a central government, but no central sovereignty. The central govern-

States of America. As a matter of fact, almost the whole of his uncompleted work was devoted to an analytical examination of the 'Leagues' among the ancient Greek States. In the half century which has elapsed since the publication of Freeman's torso, there have come into being the Federal Dominion of Canada; the North German Confederation, subsequently developed and expanded into the German Empire; and the Commonwealth of Australia, not to mention the Federal republics, too frequently neglected by the constitutional jurist, of Central and South America." Marriott, "The Problem of Federalism," *Nineteenth Century*, June, 1918.

<sup>1</sup>See Reinsch, *Public International Unions*; Woolf, *International Government*; Sayre, *Experiments in International Administration*.

<sup>2</sup>See Willoughby, *The Nature of the State*, Chap. X, and Garner, *Introduction to Political Science*, Chap. V.



ment is thus nothing more than the common organ or complexus of organs which the severally sovereign States establish and maintain for the carrying out of purposes with reference to which these States have agreed to act as a unit. This central government may thus be viewed as, in effect, a branch of the government of each of the associated States, and all the authority that it exercises is obtained by delegation from these States. The instrument which defines the power of the central government and the corresponding obligations of the States may be known as a Constitution, but, accurately speaking, it is nothing more than a treaty or compact between the States, and derives its validity from their consent to it.

Sover-  
eignty

This being the juristic nature of a confederacy, any member state may withdraw from it without being chargeable with the commission of an illegal act, and this is so even though the articles of confederation may provide for a perpetual union. Such a withdrawal by one or more states might, in such circumstances, be a violation of international good faith and furnish serious grounds for complaint upon the part of the States remaining within the Confederation, but it could not be properly asserted by them that the secession had been an illegal or unconstitutional act.<sup>1</sup> At the most, secession would be only the violation of an international compact.

Right of  
withdrawal

Distinct from the right of secession is the claim that has sometimes been put forth that, in a confederacy, each member State retains the right to determine whether or not it will permit the enforcement within its limits of those

<sup>1</sup>Cf. the discussions in the United States Senate over withdrawal from the League of Nations. Mr. Wilson in his written memorandum to the Senate Committee on Foreign Relations said that "The right of any sovereign state to withdraw had been taken for granted, but no objection was made to making it explicit." Sen. Doc. 106, 66th Cong., 1st Sess., p. 499. The first reservation adopted declared the United States to be "the sole judge as to whether all its international obligations and all its obligations under said Covenant have been fulfilled, and notice of withdrawal by the United States may be given by a concurrent resolution of the Congress of the United States." See *Congressional Record*, November 8, 1919. See above, p. 203.

Doctrine  
of Nulli-  
fication

orders of the central government which, in the opinion of such state are not authorized by the Constitution or articles of union. This is known as the doctrine of nullification. Here again it may be said that, inasmuch as each State is admitted to be legally sovereign, it cannot be held to act illegally if it refuse obedience to orders of which it disapproves. But such a disobedience, unless expressly recognized by the articles of union, is necessarily a breach of those articles; and, furthermore, the assertion of the right is, in itself, an unreasonable one, for, if exercised, the effect is to allow a State to remain in the Confederation and obtain all the advantages flowing from it while at the same time refusing to abide by such special commands as happen to be onerous or otherwise objectionable to itself. The claim of a right of nullification is thus, in some ways, a more extreme claim than is the assertion of a right of secession from the Union.<sup>1</sup> Among the more important examples of confederacies may be mentioned the old German Union which lasted from 1815 to 1866, and the Union of the American Colonies from 1781 to 1789 under the Articles of Confederation.<sup>2</sup>

<sup>1</sup>See Calhoun, *Discourse on the Constitution and Government of the United States* (Works, Vol. I), and the discussion and references in Merriam, *American Political Theories*, pp. 268-278.

"Constitutionally," said General Smuts in introducing the Peace Treaty in the Assembly of the Union from South Africa, "the Union Parliament was the legislative power for the Union; and the doctrine that the British Parliament was the sovereign legislative power for the Empire no longer held good. The British Parliament could not, without the consent of the Union Parliament, pass any law binding South Africa, without a revolution." Quoted by Hall, *The British Commonwealth of Nations*, p. 235.

<sup>2</sup>On the very interesting question of sovereignty and the British Empire, see Hall, *The British Commonwealth of Nations*, especially Chap. IX; McIlwain *The Supremacy of the High Court of Parliament*, Chap. V; and Freund, *Empire and Sovereignty* (University of Chicago Decennial Publications, Vol. IV). Cf. the following view: "The theory, indeed, of sovereignty is complete and without a flaw, but it is also startling if we view it from a democratic standpoint. The imperial sovereignty which is exercised in the name of the King actually resides in the British Prime Minister, a gentleman who holds his office at the pleasure of the majority of the British House of Commons. Therefore, in the ultimate appeal, a majority of British voters is the supreme power in the Empire. One democracy—for the time being the most numerous—holds a sovereignty, not merely over those portions of the King's dominions where, as in the case of India, the form of government is frankly autocratic, but over other democracies whom we think of, and who think of themselves, as self-governing." F. S. Oliver, *Life of Alexander Hamilton* (pop. ed.), p. 447.

As distinguished from a confederacy, a federal State (*Bundesstaat*) connotes the existence of a true central sovereign State, composed of constituent members who are not themselves severally sovereign. There are some jurists who deny that these constituent bodies-politic may be properly termed states, but in common speech they are usually so spoken of. Whether or not this is technically correct, from a juristic standpoint, need not here concern us.

Federal  
State

The central government of a federal State, being conceived of as the organ of a true central State, is not to be regarded as the common organ through which the member states of the Union realize certain of their individual ends. Rather is the reverse the case, for the central State, being admittedly sovereign, and the member states not sovereign, their governments may properly be regarded as organs through which the central State exercises its sovereign will in the several areas of the non-sovereign member states.

Nature of  
Central  
Government

The federal State is thus to be viewed as deriving its authority from its own inherent sovereignty and not by way of delegation from the member states. It may, indeed, be the historical fact that the Union was established at the common desire and by the joint coöperation of these states, but, if it be conceded that a national sovereignty exists, it is irrelevant, legally speaking, how this was brought about. The constitutional result is that the member states may no longer be viewed as themselves sovereign and upon a constitutional level with the national State. This follows from the doctrine which is now all but universally accepted by constitutional jurists that sovereignty is, by its very nature, indivisible and not subject to legal limitations. Hence there is no middle ground between a confederacy and a federal State. Either the States of a union are severally and wholly sovereign, in which case there is no real central State but only a gov-

Location of  
Sovereignty



ernment which acts as the common agent of these States and with delegate power; or there is a single national State, wholly sovereign, but exercising certain of its powers through the governmental organs of its constituent non-sovereign states.

Division of  
legislative  
authority

What we have just said has reference to the essential juristic distinction between confederacies and federal States. It will be seen that the difference is not a quantitative one as to the number or importance of the powers that are exercised by the central government. Thus it is possible to have a confederacy in which the States have delegated to their common central government the performance of a great many functions; while, on the other hand, there may be federal States in which comparatively few functions are exercised by the central government. In the one case, however, the central government is but executing duties at the direction, and in behalf, of the other States; in the other case, the governments of the States as well as the central government are acting at the behest of the federal or national State.

A question  
of policy

With reference to most of the functions of government, it is a matter of policy rather than of constitutional necessity as to which of them shall be exercised by organs and agencies of the central government or by the member States through their several governmental organizations. Thus the United States and the German Empire are both types of federal States, but there is a wide difference. The United States may be said to be legislatively decentralized; that is, the great body of the private law is furnished by each state of the Union for its own citizens. The subjects of legislation that are placed within the control of the national Congress, though very important, are not many in number. From the governmental view, however, the United States is a highly developed federal union, for there exists a complete central governmental machinery—executive and judicial as well as legislative—



through which all the federal powers are exercised. Only in a very few instances are federal laws enforced through the agencies of the individual states.<sup>1</sup>

As contrasted with the United States, the German Empire, legislatively, was highly centralized. The entire body of the private law and judicial procedure, civil and criminal, was within the control of the Imperial Parliament, the states retaining legislative powers only with reference to their own public law and local police. On the other hand, with reference to the interpretation and execution of the law thus imperially determined, the governments of the states were relied upon. Thus, the executive branch of the Imperial Government included only those bureaus or departments which dealt with certain imperial matters the execution of which it was impossible to concede to the states.<sup>2</sup>

It does not need to be pointed out that it is an element of weakness in any federal State to be obliged to resort to the authorities of the member states for the enforcement of its commands. In Germany, however, this weakness was rendered negligible by reason of the fact that one state of the Empire—Prussia—had a prestige and military power that made futile any attempt upon the part of the other states to resist its will.<sup>3</sup> Of great importance also

The U. S.  
and the  
German  
Empire

Enforce-  
ment of  
Laws

<sup>1</sup>The administration of the Selective Service Act was a striking exception. See General Crowder's reports to the Secretary of War, 1917 and 1918, and his volume, *The Spirit of Selective Service* (1920).

<sup>2</sup>Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 244; Ogg, *The Governments of Europe* (rev. ed.), p. 623; Krüger, *Government and Politics of Germany*, p. 117. The difference in the judicial systems of the two federal States is also significant.

<sup>3</sup>"The success of federal government is greatly favored by, if it does not absolutely require, approximate equality in wealth, in the population, and in the historical position of the different countries which make up a confederation. The reason for this is pretty obvious. The idea which lies at the bottom of federalism is that each of the separate states should have approximately equal political rights and should thereby be able to maintain the 'limited independence' (if that term may be used) meant to be secured by the terms of federal union. If one state of a federation greatly exceed in its numbers and in its resources the power of each of the other states, and still more if such 'dominant partner,' to use a current expression, greatly exceed the whole of the other Confederated States in population and wealth, the confederacy will be threatened

In the  
German  
Empire

was the dual rôle of the King of this state. He was *ex-officio* Emperor of the Union and constitutionally vested with the duty of bringing back into obedience to federal authority such states as were declared by the *Bundesrath* to be derelict in the performance of their imperial duties. The imperial coercion was to operate directly upon the states concerned. Thus, the size, military power, and predominance of Prussia in the *Bundesrath*, were sufficient to avoid the use of coercion against the other states, while making it inconceivable that it would be applied against the most powerful state.

In the  
United  
States

In the United States, the existence of complete executive and judicial departments makes possible the vindication of national supremacy by applying compulsion to the individuals who resist the national authority. If, in justification of this resistance, these individuals appeal to laws or executive orders which their respective states have issued, the reply is that in so far as these laws or orders are in violation of the Federal Constitution or laws, they are without legal force and therefore furnish no defence for any actions taken in pursuance of them. Thus, in constitutional theory, the Civil War of 1861-1865 was a contest carried on by the United States against the citizens of the eleven southern states which had sought to withdraw from the Union, rather than against those states themselves.<sup>1</sup> But whether constitutional provision be made for exerting coercion upon the states of a union or upon

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with two dangers. The dominant partner may exercise authority almost inconsistent with federal equality. But, on the other hand, the other States, if they should possess under the constitution rights equal to the rights or the political power left to the dominant partner, may easily combine to increase unduly the burdens, in the way of taxation or otherwise, imposed upon the one most powerful State." Dicey, *Law of the Constitution* (8th ed.), p. LXXV.

<sup>1</sup>"It may be not unreasonably said that the preservation of the States and the maintenance of their Governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States." *Texas v. White*, 7 Wallace 700 (1868).

their citizens, it is indispensable in any federal State that it should have the final power, through its own organs, of determining the validity of its own acts as well as of those of the member states or of their inhabitants; and of enforcing these determinations when made.

The necessity of giving to an organ of the federal government the final decision of all questions of national authority was perceived by the first congress organized under the National Constitution when, in the famous Twenty-Fifth Section of the Judiciary Act of 1789, it was provided that an appeal to the Supreme Court of the United States might be taken from a final judgment or decree in any suit in the highest court of a state in which a decision could be had, "where is drawn into question the validity of a treaty or statute of, or authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission."<sup>1</sup>

Judiciary  
Act of 1789

Those who, like John C. Calhoun and his school, sought to maintain that the Union provided for by the Constitution was a confederate and not a federal one, clearly saw that such a provision as the one which has been quoted would, if held valid, be fatal to their contention. The

Theory of  
Calhoun

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<sup>1</sup>The Judiciary Act was amended in 1914 (Act of December 23, 1914; 38 Stat. at L. 790) so that a case can be appealed when the decision is *against* the validity of a state law. This question figured in the discussion of the recall of judicial decisions. See Ransom, *Majority Rule and the Judiciary*.

constitutionality of this provision has, however, been upheld by the federal Supreme Court and that tribunal will hold void any law of an individual state which in its possible effect can in any way interfere with the force and efficient exercise of any of the powers that are possessed by the Federal Government.<sup>1</sup>

And of U. S.  
Supreme  
Court

As regards the right of a federal government such as the United States is now conceded to be, to enforce its laws within the states and against any opposition that may be raised against them, we may quote the striking language of the federal Supreme Court, in the so-called *Debs* Case: "The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. . . . If the emergency arises, the army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws."<sup>2</sup>

Although, as has been said, it is not possible to distinguish a sovereign State from a confederacy upon a purely quantitative comparison of the functions exercised in each by the central government, there are, nevertheless, certain powers which the central government of a federal State must possess and directly exercise.

Powers of  
a Federal  
State

It has already been seen that the National Government must have the right to determine finally and conclusively the extent of its own legal powers as well as those of the member states, and there must also exist legal processes by means of which these final decisions as to constitutional competency may be enforced. Negatively stated, this means that the member states shall not have a legal right, under any circumstances, to "nullify" a federal law. Together with this legal right of final determination of conflicts of jurisdiction between national and state govern-

<sup>1</sup>Willoughby, *Constitutional Law of the United States*, Vol. I, Chap. V.

<sup>2</sup>*In re Debs*, 158 U. S. 564 (1895).



ments must go the possession by the federal government of a military force adequate to enforce its decisions.

It is practically imperative that, in a federal State, the control of foreign affairs should be in hands of the central government. In some federal States the member states are permitted to have intercourse with foreign States and even to enter into treaties with them with regard to certain local purposes; but in no case are these individual states allowed to have direct relations with regard to matters of general political importance, and, in all cases, the national State is held finally responsible to foreign States for any breaches of international right or treaty obligations which the individual states may have authorized or which have been committed within their several borders. In the United States this international responsibility of the federal government has at times given rise to very serious embarrassments upon its part, for upon these occasions it has found itself internationally responsible for conditions which it was legally unable to control. This legal incompetence has been due, however, rather to the failure of Congress to enact the necessary legislation than to an absolute lack of constitutional authority in the central government.<sup>1</sup>

Control of  
Foreign  
Affairs

<sup>1</sup>There is a very adequate discussion of federal protection of the treaty rights of aliens in Taft, *The United States and Peace*, Chap. II. See also, Corwin, *The Doctrine of Judicial Review*, Chap. V; *Report of the American Bar Association*, Vol. XV, p. 418 (1892); Willoughby, *Constitutional Law of the United States*, Vol. I, p. 506; Borchard, "Treaty-Making Power as Support for Federal Legislation," *Yale Law Journal*, February, 1920; *Missouri v. Holland*, 252 U. S. 416 (1920); and Professor Corwin's comment, *American Political Science Review*, February, 1921.

It is interesting to note that the report of the Commission on International Labor Legislation of the Peace Conference recognized a special exception in the case of federal states with reference to the obligation of carrying out recommendations for labor legislation. The exception, the report said, "places the United States and States which are in a similar position under a less degree of obligation than other states in regard to draft conventions. But it will be observed that the exception extends only to those federal States which are subject to limitations in respect of their treaty-making powers on labor matters. . . . Though reluctant to contemplate an arrangement under which all states would not be under identical obligations, the Commission felt that it was impossible not to recognize the constitutional difficulties which undoubtedly exist in the case of certain federal States." See *International Conciliation*, No. 140, July, 1919, p. 12.

**National  
Defense**

As the sole representative of the nation in its international dealings it is of course necessary that a federal government should possess adequate military forces for purposes of both offense and defense—or at least it should possess the constitutional authority to provide for and maintain an adequate army and navy when the occasion for their use arises.

**Taxation**

As a practical proposition it is also necessary that the federal government should be constitutionally empowered to raise an adequate income, either by taxes or loans or both. It is, of course, possible to provide that the financial needs of the general government shall be met by assessments levied upon the states as such, and apportioned among them according to their size, wealth, population, or any other principle that seems just and politically expedient. This, in part, was the plan pursued in the German Empire. In Germany there were special reasons why “matricular” contributions of the States, as they are called, were provided for,<sup>1</sup> but, in general, it may be said that it is expedient that the national government should be able to provide itself with funds without needing in any way the coöperation or acquiescence of the federated States. So important is this principle felt to be in the United States that the individual states are not permitted to levy the smallest tax upon the bonds or other evidences of indebtedness of the nation, or upon the income derived from them.<sup>2</sup>

**Interstate  
Commerce**

Though perhaps not indispensable, experience has shown that it is highly desirable that, in a federal State, the general government should be authorized to regulate trade and commerce among the states, including, if found expedient, the construction, ownership, and direct operation of interstate railway and steamship lines, the telegraph, telephone, wireless, and other means of communica-

<sup>1</sup>Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 244.

<sup>2</sup>Willoughby, *Constitutional Law of the United States*, Vol. I, p. 102.

tion. The opinion, is, indeed, widely held that this authority should include as well those instrumentalities of trade and communication which operate wholly within State lines, for, in the present day, so intimate are interstate and intrastate commercial relations that a severance of the two, placing the regulation of the one in the hands of the general government and of the other in the hands of the several state governments, is often impossible, and, where possible, not desirable.<sup>1</sup> It is also very desirable, though not absolutely necessary, that, in a federal State, the control of the currency should be subject to the regulation, if not exclusively vested in the hands, of the national government. The reasons for this require no elaboration.

Currency

One other power which it is highly important that a Federal Government should possess is the right to require that the citizens of each state of the Union shall be accorded in all the other states of the Union those civil rights of residence, ownership, and use of property, freedom of contract, guarantees of rights of speech and press, due process of law, etc., which those states accord to their own citizens. In fact, no state should be permitted to discriminate in any way, except as to political rights, between its own citizens and those of other states. And even as to these political rights provisions should exist whereby, without onerous restrictions, the citizens of the one state may obtain citizenship in another state and thereby become entitled to the political rights which appertain to that status.

Discrimination by Individual States

In all the federal States which now exist care is taken to provide for this interstate comity. Thus in the United States it is constitutionally established that a state cannot forbid the citizens of other states of the Union from establishing their residence within its borders and becoming its

Interstate Comity

<sup>1</sup>For the extent to which Congress now controls the transportation system of the country, cf. the New York Central and other rate cases under the Esch-Cummins Law.



## Citizenship

citizens; and it is specifically provided that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and, furthermore, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every State"; that fugitives from justice must be given up; and that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."<sup>1</sup> With reference to this last requirement we have the statement of the Federal Supreme Court that "It has been justly said that no provision of the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the others, giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the union which now exists."<sup>2</sup>

In all federally organized States the aim is to harmonize the continued existence of the member states with the maintenance of national unity and strength. And thus we find alongside of national citizenship the recognition of a state citizenship which has no real analogue in autonomous local government areas of unitary States.

Controversy in the  
U. S.

In the United States there was for many years a dispute as to the constitutional nexus or relation between federal and state citizenship—whether the former depended upon and arose out of the latter or vice versa—and this controversy was not finally settled until the adoption, in 1868, of the Fourteenth Amendment to the federal Constitution. This made it certain that federal citizenship was to be held paramount to state citizenship, for, upon the one hand, the states were declared to play no part in determining

<sup>1</sup>See Lien, *Privileges and Immunities of Citizens of the United States* (Columbia University Studies, Vol. LIV), and Howell, *The Privileges and Immunities of State Citizenship* (Johns Hopkins Studies, Vol. XXXVI).

<sup>2</sup>Paul v. Virginia, 8 Wallace 168 (1868).



who should be deemed citizens of the United States, and, upon the other hand, they were not henceforth to be able to control their own citizenship since it was provided that any person enjoying national citizenship should by mere residence within a state (which that state could not constitutionally prevent) become one of its own citizens. As regards both federal and state citizenship the Fourteenth Amendment declared in absolute terms that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

The  
Fourteenth  
Amendment

Though thus placed upon a subordinate plane, state citizenship was not, by this amendment, destroyed or merged in the national citizenship. To each citizenship are still attached distinctive and important appurtenant rights, the enumeration or specific description of which would, however, carry us too far into the special constitutional jurisprudence of the United States.<sup>1</sup>

There is nothing in the nature and form of a federally organized State to make impossible the extension of its sovereignty over areas which are not included within the limits of its member states. Thus, since the beginnings of its existence, the United States has possessed what are called "territories" which are not states, occupy a different constitutional status, and have only such autonomous powers and rights of self-government as Congress sees fit to grant to them. Some of these areas, known as unorganized territories, have had almost no self-government, while to others, known as "organized territories," Congress has given complete governmental structures, including locally elected legislatures. The governors and judges of these territories have, however, been appointed by the President of the United States and the acts of the legislatures have been subject to annulment by Congress—a

Control of  
Territories

<sup>1</sup>Van Dyne, *Citizenship of the United States*; J. S. Wise, *A Treatise on American Citizenship*, and Garner, *Introduction to Political Science*, pp. 330-372.

**The Insular Cases**

right which Congress has very seldom exercised. Since the Spanish-American War, the United States has possessed the Philippine and Hawaiian Islands, Porto Rico, and other less important islands, which are termed insular dependencies but which are, in all but name, colonies pure and simple. In a number of decisions defining the constitutional status of these islands, the federal Supreme Court has introduced what is practically a new classification of territories, dividing them into two groups according to whether or not they have been "incorporated" into the United States. By these decisions it is held that certain constitutional guarantees do not apply to those territories which have not been "incorporated" but do apply to those which have been accorded this status. Thus, for example, the constitutional provision that all in direct taxes shall be "uniform throughout the United States," has been held not necessarily applicable to "unincorporated" areas. It lies within the discretion of Congress to determine when incorporation shall take place; but, whether incorporated or not, the form of government which a territory is to enjoy is a matter with regard to which Congress can act as it sees fit.<sup>1</sup>

**Admission of new States**

Constitutional provision is made for the admission of new states into the American Union and thirty-five have been admitted, all of them, with the exception of Texas, being created out of territories already under the sovereignty of the United States. Texas seceded from Mexico, its independence was recognized by the United States, and it was then admitted to the Union as a state without passing through the territorial status.

**Alsace and Lorraine**

The German Empire, after 1871, possessed the imperial territories of Alsace and Lorraine. These two provinces, taken from France, step by step were accorded greater rights of self-government, and a higher constitutional status, until, shortly before the outbreak of the World War,

<sup>1</sup>See Willoughby, *Constitutional Law of the United States*, Vol. I, p. 407 ff.

they enjoyed most of the rights possessed by the states of the Empire.<sup>1</sup>

It is not essential to the federal form of government that the member states should all stand in exactly the same relation to the federal government as regards their respective autonomous powers or the right to participate in the control and management of the general government. In the United States, however, the doctrine of state equality prevails.<sup>2</sup> It is true that different states have a different voting power in the election of the President and Vice-President, and send different numbers of representatives to the Lower House of Congress. But these distinctions arise out of differences of population and are determined by a rule that is uniform in its application to all of the states, so that, even here, it cannot be said that the states are constitutionally unequal.

In Canada the provinces, and in Australia the states, have equal constitutional rights,<sup>3</sup> and the same is substantially true in Switzerland, where, however, certain of the cantons are known as "half-cantons," which send only one member to the council of states (whereas the other cantons send two) and have but half a vote when constitutional amendments are being passed upon.<sup>4</sup> On the other hand, in the German Empire there were substantial differences in constitutional powers of the different states. Prussia's King was *ex officio* the German Emperor, and to Bavaria, Württemberg and Baden special rights were accorded with reference to the control of the postal system and telegraphs, and taxes upon brandy and beer.<sup>5</sup>

Equality of  
States

In the  
German  
Empire

<sup>1</sup>See Coleman Phillipson, *Alsace-Lorraine: Past, Present, and Future* (1918); Ogg, *The Governments of Europe* (rev. ed.), p. 638.

<sup>2</sup>But see Professor Dunning's query, "Are the States Equal?" in his *Essays on the Civil War and Reconstruction*.

<sup>3</sup>See Keith, *Responsible Government in the Dominions* (ed. 1909), Chap. VIII.

<sup>4</sup>Brooks, *Government and Politics of Switzerland*, Chap. XIV. See Professor Dicey's valuable discussion of Swiss and Australian federalism, *The Law of the Constitution*, Notes VIII and IX.

<sup>5</sup>Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 246. Prussia also had the power, through representation in the *Bundesrath*, to

Limitations  
on federal  
power

In the United States the federal government possesses only those powers specifically given to it by the constitution and such as are "necessary and proper" for carrying into effect these specifically granted powers. The state governments are thus the residual claimants to all powers not granted to the federal government or specifically denied to them by the national Constitution. In the Canadian Federation a greater attempt is made to enumerate just what powers shall be possessed by the provinces as well as by the Dominion Government, but, from the nature of the case, such enumeration cannot be exhaustive and, though the language of the British North American Act of 1867, which serves as the Canadian Constitution, is not very plain, it has been established by judicial interpretation that the residual or unenumerated powers belong to the central government. In the Australian Commonwealth, in Switzerland, and in Germany (before 1918) the general government possesses only those powers specifically or by necessary implication granted to it. The fact, however, that in Switzerland and Germany the constitutionality of a federal statute may not be questioned in the courts, makes it, of course, possible for the federal legislature to construe its own powers as liberally as it may please.

Protection  
of individual  
rights

In all federally organized States the general government is given certain rights of supervision over the states in order to see that they faithfully execute their constitutional duties. The supervision extends not only to seeing that the national supremacy is maintained and the free and efficient exercise of its powers in no way interfered with, but to making it certain that the member states do not violate certain personal and property rights which are specially recognized and guaranteed in the Federal Constitution. It may, however, be remarked that in the

defeat constitutional amendments and changes in military and revenue legislation. Prussia also controlled the chairmanships of all *Bundesrath* committees except that on foreign affairs, the chairmanship of which was held by Bavaria.



United States, until the adoption in 1868 of the Fourteenth Amendment to the Federal Constitution, this federal guarantee of protection to the individual against oppressive action upon the part of his own individual state extended only to a few specific matters, such as the impairment of the obligation of contracts and penal laws of an *ex-post-facto* character. Since the adoption of the Fourteenth Amendment, however, the private rights of the individual have to a considerable extent been brought under the protecting power of the national government by the operation of the provision of that Amendment that no state "shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The requirement of "due process of law" has been given a very broad connotation, so that it includes not only matters of procedure, but of substantive rights, irrespective of the procedure by which they may be effected. Thus, in all their dealings with their own citizens or with those who happen to be within their borders, including corporations, the federal government sees to it that private rights of life, liberty, and property shall not be abridged by the states except upon good grounds; and that, in every case, the procedure shall be such as furnishes the individual affected an opportunity to present before an impartial tribunal such arguments or evidence as he may have, showing why he or his rights should not be brought within the control of a given state law, or that the law itself is invalid.

The description that has been given a federal government is sufficient to show that in such a scheme of government the member states occupy a position that resembles that of local government areas of unitary States to which are given considerable autonomous powers. One is, therefore, justified in asking what, precisely, are the characteristics that distinguish a federally organized government from a unitary government in which wide discretionary

By the  
Federal  
Government

Powers of  
local divi-  
sions

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powers and liberal rights of self-government have been granted to local areas; or, to state the question in another form, in just what respects do the member states differ from the autonomous administrative areas of a unitary State?

### Question of Sovereignty

The difference, as will be shown, is considerable, but it may be well in the beginning to point out that the distinction does not exist in the possession by the member states of any part of a sovereignty that is not possessed by the local government areas. Both the member states and the districts derive such powers as they possess from the sovereign State of which they are constituent parts. The governments of both are local agencies for the purposes of the central government. Their political powers are emanations from the sovereignty of the national State. They have a legal status only as parts of the State, and no status independently of it.<sup>1</sup> But this is a mere conclusion of analytical political theory, deduced from the indivisibility, inalienability, and legal omnipotence connoted by the juristic conception of sovereignty. As a matter of practical fact, there are very important differences between the states of a federal union and the autonomous districts of unitary States.

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<sup>1</sup>The agitation (1911-1917) for the federation of the British Empire raises a number of very interesting questions. The issues are adequately discussed by Dicey, *The Law of the Constitution*, Introduction (8th. ed.), and Duncan Hall, *The British Commonwealth of Nations* (1920), Chap. VIII, perhaps the most valuable book on present-day imperial problems. The idea of federation seems to have been effectively scotched in 1917 through definite vetoes by British party leaders. The objection of labour was that "we do not intend by any such 'Imperial Senate' either to bring the plutocracy of Canada and South Africa to the aid of the British aristocracy, or to enable the landlords and the financiers of the Mother Country to unite in controlling the growing Popular Democracies overseas." ("Labour and the New Social Order," in Rogers, *Problems of Reconstruction; National and International*, p. 117 (*International Conciliation*, February, 1919). Whatever may be said of the merits of this argument, it was not without weight. Other valuable discussions of the question are the following: Low, "The Imperial Constitution: The New Phase," *Nineteenth Century*, August, 1917; Pollock, "Imperial Unity: The Practical Conditions," *Quarterly Review*, January, 1918; Curtis, *The Problem of the Commonwealth* (1915); Marriott, "British Federation: A Vanished Dream," *Nineteenth Century*, September, 1917.

In the first place, though not recognized as sovereign entities, the members of a Federal State so far resemble sovereign States that, except as qualified by federal obligations, they stand toward each other as independent and foreign powers. This means that each member state constitutes a jurisdiction outside of which none of its acts—executive, legislative or judicial—has any force. Thus a law enacted by one state, on a writ issued by one of its courts, has no operative force outside of its own territorial limits, and no one of its officials can exercise any authority beyond such borders. This, of course, is the general principle that applies between sovereign States, and it applies to the states of a federal union subject only to such provisions as may exist in the National Constitution with regard to interstate relations. Thus, in the United States, notwithstanding the constitutional provisions that have been cited, with regard to interstate comity, and in giving of full faith and credit by each state to the public acts of the other states, it still remains true that the states are without the legal power to issue a writ upon which the presence of a witness who is in another state may be obtained, and a notice of the beginning of a suit against a non-resident does not give jurisdiction to the courts of a state except in those cases which are known as actions *in rem*. A judgment obtained in the courts of one state will not, as such, be executed by another state.<sup>1</sup> A suit must first be brought upon that judgment, as one would on a promissory note, in the state in which enforce-

“Full faith  
and  
credit”

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<sup>1</sup>The clause of the Federal Constitution which decrees that full faith and credit shall be given to the public acts and judicial proceedings of the other states then applies so that in the suit thus instituted, the judgment may not be attacked upon its merits. This is precluded by the decision of the state court in which it was originally rendered. The only defence that may be made when suit is brought upon it in the courts of another state is that the original court did not have jurisdiction over the parties or subject matter. For the complicated questions that have arisen through the reluctance of the courts to recognize Reno divorces, see Willoughby, *Constitutional Law of the United States*, Vol. I, p. 205; *Haddock v. Haddock*, 201 U. S. 562 (1906); *Atherton v. Atherton*, 181 U. S. 155 (1901); and *Thompson v. Thompson* 218 U. S. 611 (1910.)



ment is sought. Nor can one state compel another state to return to it fugitives from its justice.<sup>1</sup>

Citizenship  
and Allegi-  
ance

A further respect in which the members of a federal State are distinguished from local government areas and in which they resemble fully sovereign States is that they have, as has been already pointed out, a citizenship of their own. And this citizenship imports such an allegiance upon the part of the citizens that a breach of it may be punished as high treason.

As distinguished from local government areas, the states of a federal union hold such self-governing powers as they have in firmer legal possession. This is due to the fact that these rights are enumerated and guaranteed in the written constitution upon which the federal union is itself based. Thus, the Supreme Court of the United States has declared that the United States is an "indestructive union of indestructible States." This is possibly a somewhat exaggerated statement, since, by amendment of the Federal Constitution it would conceivably be possible, by strictly legal means, to deprive the states of any or all of the self-governing powers they possess, and this might be done against the will of any particular state, since the unanimous approval of the states to amendments of the Federal Constitution is not required.<sup>3</sup>

Constitu-  
tional  
guarantee  
of auton-  
omy

<sup>1</sup>Interstate extradition is provided for by the Federal Constitution but it has been held by the Supreme Court that, though mandatory in terms, there is no constitutional means by which the states may be compelled to fulfill the obligations thus laid upon them. See *Kentucky v. Dennison*, 24 Howard 66 (1860).

<sup>2</sup>See, for example, the arguments that the Eighteenth Amendment to the Federal Constitution was "unconstitutional" on the ground that it "destroyed" the states.

The fact should not be lost sight of that rights are guaranteed the member states of a federation by a written constitution which the central government may not alter by itself. The new German Constitution allows amendment by the legislature, with special provisions as to the majorities required. There must be two thirds of the members of the *Reichstag* present and two thirds of them in favor of the amendment; a two-third vote in the *Reichsrath*, or National Council, is also necessary. An amendment may be initiated by the people and the objection of the *Reichsrath* may be overcome by a referendum. This arrangement leads Professor Ogg to doubt whether the government is really federal. *The Governments of Europe* (rev. ed.), p. 725.

<sup>3</sup>Possible exceptions to the above statement are exhibited in the constitutional provisions that no state shall be deprived of its right to equal representation in



This constitutional security of the states of a federal union is, in most cases, rendered still more firm,<sup>1</sup> by reason of the fact that, before the establishment of the union, they were, in historical fact, if not in juristic interpretation, the creators of the union. They thus have behind them a political sentiment in support of their self-governing status to which local government areas can seldom lay claim.

Importance  
of political  
sentiment

Not in all cases, however, have the member states of federal unions originally been independent States. Thus, in the United States, only fourteen of the present members can be said to have been originally sovereign bodies-politic; and in the Dominion of Canada, only Ontario, Nova Scotia, New Brunswick, and Prince Edward Island were originally separate colonies;<sup>2</sup> and none of the present member states of Mexico, Argentina, and Brazil can lay claim to an independent existence prior to the establishment of the unions of which they are constituent parts.

Another and most important distinction that places the member states of a federal union upon a plane of dignity and importance far above the most autonomous local government areas, is that, subject to few restrictions, each federated state is able to determine for itself the form of its own government, a right which includes also the authority to establish for itself such local government agencies as it sees fit. In sharp contrast with this is the principle that the local subdivisions of unitary States have their forms of government determined for them by national law.

Freedom to  
determine  
form of  
government;

the Senate and that new states shall not be erected out of parts of the original states or by the union of two or more of them, without the consent of the states concerned. It is, however argued by some commentators that even these inhibitions can be overcome by first eliding them from the Constitution by the ordinary process of constitutional amendment. See Burgess, *Political Science and Constitutional Law*, Vol. I, p. 154; Freund, *Empire and Sovereignty*, p. 10.

<sup>1</sup>For the security of the states of the German Empire and other federations, see Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 246; Freund, *Empire and Sovereignty*, p. 10; Brooks, *Government and Politics of Switzerland*, Chap. XIV.

<sup>2</sup>Porritt, *The Evolution of the Dominion of Canada*, Chap. XIV.

Enactment  
of private  
law

A further respect in which in federations like the United States, Canada, and Australia the member states occupy a much more important and independent existence than do the local government areas of any unitary States is that legislative authority is given to each federated state to determine for its own inhabitants the great body of the law, civil and criminal, substantive and procedural, which regulate their private relations, whereas local government agencies have no option but to enforce the laws which they receive from the central government. In the German Empire and Switzerland the entire body of private law is placed within the legislative competence of the central government and, in this respect, therefore, the Swiss cantons and the individual German states resemble the local governments of unitary States. But, upon the other hand, as has been earlier pointed out, these nationally created laws are interpreted and enforced almost wholly through the governmental agencies of the states, which thus gain, through the executive, what they have lost legislatively, as compared with the states of Australia and of the United States, or the provinces of Canada.

Control of  
local matters

In this connection it may be said, generally, although the principle cannot be laid down in precise terms, that local governments, however autonomous, are conceived of in part at least as the agents to carry out, within their respective areas, the will of the central government. It may be that they are permitted in large measure to select for themselves the public officials by which they are to be locally governed, and with regard to purely local matters they may be given discretionary authority as to what regulations shall be issued and enforced; but it still remains true that their several governing agencies are conceived of as acting as agencies of the central government.

Thus regarded, the operations of local governments are commonly subject to greater supervision and control by the central authorities than are the activities of the member

states of a federal union. Ordinarily the acts of federated states, if falling within the constitutional fields marked out for them by the national constitution, are not subject to censure or annulment by the central government. It is only when some prohibition of the national constitution is violated, or some national right invaded, that a cause for national intervention arises. With regard to local governments, however, the central government usually exercises a continuous and comprehensive supervision.

**Intervention  
by Federal  
Government**

For the most part it is within the discretion of the federated states to determine whether or not their constitutional powers shall be exercised; for the local governments there is usually no option. To them their duties are more often mandatory in character, and when there is a failure upon their part to carry out the orders which they have received, the correction usually comes in a more direct and summary manner than is the case when the states of a federal union are derelict in the fulfilment of their federal obligations.

Because of the wide range of their autonomous powers, the member states of all federal unions are equipped with practically complete frameworks of government—executive, legislative, and judicial; so complete, in fact, that should the central government be destroyed, these states would be practically ready at once to exercise through their existing governments the functions previously performed by the general government and thus to stand forth as fully organized bodies-politic.

**Political  
machinery  
of States**

Strongly contrasted with this completeness of organization are the governmental agencies of the most autonomous and self-governing administrative areas. In very many cases, indeed, local governments possess no real legislative bodies, but only executive officials who have ordinance-making powers. Thus, in the entire United States there is not a single local government, if we except the cities, that is provided with a legislative body, distinct from the ex-

**And local  
areas**



ecutive agents, composed of elected representatives of the people; although, as earlier pointed out, there are in the "Towns" brief annual meetings of the citizens or taxpayers. In England since 1888 there have been locally elected "County Councils" and, since 1894, "District Councils," but these have administrative rather than legislative powers and operate almost wholly through committees.<sup>1</sup>

Defects of  
Federal  
Govern-  
ment

The disadvantages of the federal system of government are obvious.<sup>2</sup> It necessarily means, to a considerable extent, a duplication of governmental machinery, and this is especially so in a federation of the American type, in which practically all the national functions are exercised through national agencies. This is a genuine duplication of governmental machinery and is not to be compared with the existence in unitary States of central and local organs, the latter of which are essentially administrative in character, and supplement, instead of duplicating, the central executive agencies. A federal government is thus a complicated as well as an expensive method of political rule. In addition it is politically and administratively weak.

Political  
weakness

It is politically weak because authority is divided, and

<sup>1</sup>Marriott, *English Political Institutions*, p. 262.

<sup>2</sup>Severe criticism has been made of federal government on the ground that it "is developing, under modern economic conditions, disadvantages of increasing magnitude and is out of harmony with the general environment, of modern industrialism." Federal government, it is said, "creates something like a legislative chaos in which the conflict of rival authorities and the infinite confusion of jurisdiction removes from the state and federal governments alike the ability to exercise a proper and adequate control. Laws in reference to labor, capital, commerce and transportation, whether adopted by state or federal legislature, are honeycombed by constitutional limitations, riddled with adverse decisions and in the intricate state of the law are absolutely at the mercy, for weal or for woe, of the judicial authorities. Under these circumstances, the impotence of the legislative branch of the government enables the judiciary to invade the sphere of the legislature and to constitute itself a quasi-legislative power, annulling or sustaining legislation, and expanding or contracting the competence of other bodies in the state according to its own opinion of what is best in the public interest. If the judiciary could perform this function in such a way as to actually and effectively set up a national and uniform control of industry and commerce, there would be no fault to be found except perhaps by persons infatuated with pure theory or by purblind advocates of the doctrine of state rights. But this effective, uniform control is precisely what is lacking, nor is there any prospect, under the present system, of its achievement." Leacock, "The Limitations of Federal Government," *Proceedings of the American Political Science Association*, Vol. II, p. 37 (1908).



there is ever the danger that the member states will refuse to fulfil their constitutional duties, or, at least, will be negligent and lax in so doing. In the United States, as is well known, there were numberless conflicts between federal and state authorities during the early history of the federation. Some of these aroused bitter feelings, and the dissension was manifested in the Civil War of 1861-1865. And, as has already been said, there have been not a few occasions when the federal government has been greatly embarrassed in its dealings with foreign nations by the failure or open refusal of the states to give full recognition within their borders to the international rights of resident aliens. There are pending at the present time questions of this sort for which no fully satisfactory solution has been found.<sup>1</sup>

Conflicts of  
jurisdiction

Administratively viewed, the federal system is an unsatisfactory one because state borders constitute jurisdictional lines that state authorities cannot cross. This greatly hinders the administration of justice, making difficult and often impossible the serving of that notice upon defendants of the beginning of judicial proceedings, which must be had in order that jurisdiction may be obtained to proceed against them; the attendance of unwilling witnesses in another state cannot be enforced; property removed from one state to another in order to escape taxation or liability for seizure in payment of a debt or legal judgment is difficult to reach; and, as we have seen, when a personal judgment is obtained in one state it cannot be enforced in another state except by instituting a new suit upon it in the state in which its enforcement is sought. Finally, troublesome extradition proceedings must be gone through with before fugitives from the justice of one state can be apprehended in a state to which they may have fled.

Judicial  
proceedings

<sup>1</sup>On the legal aspects of the anti-Japanese legislation in California, see Corwin, *National Supremacy*; Tucker, *Limitations on the Treaty-Making Power*; *Columbia Law Review*, Vol. XII, p. 85; *American Political Science Review*, Vol. I, p. 393; *American Journal of International Law*, Vol I, p. 273.

Lack of  
Uniformity  
of Laws

When, as in the United States, each state determines for itself the private laws, civil and criminal, which are to have validity within its limits, the practical disadvantages of the federal system are multiplied. To mention but a few of the disadvantages thus arising, legal instruments, including wills, deeds, and all sorts of commercial contracts, may be valid in some states while invalid in others; common law principles receive different interpretations in the different states; statutory laws are alike in no two states; a child may be legitimate in one state and illegitimate in another, and a man may be deemed married or unmarried according to the state he is in—he may even be regarded as married to one woman in one state and the husband of another woman in another state. A corporation having a legal existence in the jurisdiction of its birth has no right to do business in another state without its consent, unless it happens to be engaged in interstate commerce, which, fortunately, is placed within the regulating control of the general government. In the United States the attempt is made to overcome some of this diversity of state law by the drafting of model acts dealing with some of the more important subjects, such as negotiable instruments, marriage and divorce, and securing their adoption in identical terms by the several states. This, however, is a very tedious and slow process; and even when uniformity has been secured, it is impossible to maintain it, for there is no way of guaranteeing that the statutes thus adopted will receive the same interpretation by the courts of the different states.<sup>1</sup> The only real solution of this evil is, therefore, to transfer the legislative power to the central government, whose laws, of course, have validity throughout the Union.

Reform in  
the United  
States

In all the federal unions of the world the tendency has been to extend the scope of the federal power. In part, this

<sup>1</sup>Cf. C. T. Terry, *Uniform State Laws in the United States, Annotated* (1920); Wigmore, *Problems of Law: Its Past, Present, and Future*, Chap. II.

has been inevitable; the development of means of communication has made commercial or other interests increasingly national in character.<sup>1</sup> In part, the tendency has been political; the stronger government is looked to for financial assistance and for regulatory measures. The expansion of the powers of the central government results in a corresponding diminution of the powers of the states, and this aggrandizement, in turn, has been accelerated by an astonishing and as yet almost unnoticed, atrophy of state functions.<sup>2</sup>

To make more nearly complete the enumeration of the disadvantages inherent in the federal system, the fact needs to be pointed out that federalism necessarily leads to innumerable technical controversies between the states themselves, and between them and the Union as to their respective spheres of authority. The well-known English publicist, A. V. Dicey, has said that "federalism means legalism," that is, the settlement by juristic interpretation of disputes which, in other states, are disposed of upon a

Controversies between member States

<sup>1</sup>On the tendency of the central government to acquire more and more power, see Bryce, "The Action of Centripetal and Centrifugal Forces on Political Constitutions," *Studies in History and Jurisprudence*, p. 216; Marriott, "The Problem of Federalism," *Nineteenth Century*, June, 1918; and with reference to the United States, Franklin Pierce, *Federal Usurpation* (1908), and H. L. West, *Federal Power* (1919).

<sup>2</sup>On the responsibility of the states for the increase of federal power, see Ford, "The Influence of State Politics in Expanding Federal Power," *Proceedings of the American Political Science Association*, Vol. II, p. 53 (1908); Root, "How to Preserve the Local Self-Government of the States," *Addresses on Government and Citizenship*, pp. 363, 371, 375, and Croly, *The Promise of American Life*, Chap. XI. These writers, however, discuss the problem generally rather than with specific details, and no attempt that we know of has been made to determine how far, within a common jurisdiction, the federal government is active while the states are passive. Cases come into the federal courts and prosecutions are conducted by the federal government, for example, because of the incident of a letter being sent through the mails, when the crime is really against state law. The rapidly expanding police regulations of the federal government (see Cushman, "Studies in the Police Power of the National Government," *Minnesota Law Review*, April, May, and June, 1919, and March and May, 1920) are in part due to the failure of the states to deal with different evils. Finally, the federal government, as is referred to elsewhere, is resorting to appropriations to help the states care for what hitherto have been their own local problems. See Douglas, "A System of Federal Grants-in-Aid," *Political Science Quarterly*, June and December, 1920.



basis of equity, compromise, and political expediency.<sup>1</sup> It is certain, therefore, that, irrespective of any other considerations, the federal system is not suited to a people who are not habituated to the rule of law, trained in an appreciation of legal distinctions, and disposed to acquiesce in judicial determinations, even with reference to matters of the greatest political importance.<sup>2</sup>

Advantages  
of Federal  
Govern-  
ment

The special advantages of the federal form of government, of course, consist in the fact that it permits of the satisfaction in fuller form than is possible under any system of ordinary local government of the desire that may be felt by the citizens of the individual states to preserve their rights of self-government while, at the same time, yielding obedience as to certain matters to a common political authority.<sup>3</sup> It is, however, to be observed that,

<sup>1</sup>*The Law of the Constitution*, Chap. III; see also Dicey's article, "Federal Government," *Law Quarterly Review*, Vol. I, p. 80 (1885). On the question of legalism, see McIlwain, *The High Court of Parliament and its Supremacy*, Chap. I.

<sup>2</sup>Lord Bryce's criticisms of federations are so important that they should be referred to at some length. He lists as follows the faults generally charged on federal as compared with unitary governments: (1) weakness in the conduct of foreign affairs; (2) weakness in home government, that is to say, deficient authority over the component states and individual citizens; (3) liability to dissolution by the secession or rebellion of states; (4) liability to division into groups and factions by the formation of separate combinations of the component states; (5) absence of the power of legislating on certain subjects wherein legislation uniform over the whole Union is needed; (6) want of uniformity among the states in legislation and administration, and (7) trouble, expense, and delay due to the complexity of a double system of legislation and administration.

The arguments he enumerates in favor of federalism are the following: (1) "Federalism furnishes the means of uniting commonwealths into one nation under one national government without extinguishing their separate administrations, legislatures, and local patriotisms"; (2) "Federalism supplies the best means of developing a new and vast country"; (3) "Federalism prevents the rise of a despotic central government, absorbing other powers, and menacing the private liberties of the citizen"; (4) "Self-government stimulates the interest of the people in the affairs of their neighborhood, sustains local political life, educates the citizen in his daily round of civic duty. . . ."; (5) "Self-government secures the good administration of local affairs by giving the inhabitants of each locality due means of overseeing the conduct of their business"; (6) "Federalism enables a people to try experiments in legislation and administration which could not be safely tried in a large centralized country," and (8) "Federalism, by creating many local legislatures with wide powers, relieves the national legislature of a part of that large mass of functions which might otherwise prove too heavy for it." *The American Commonwealth*, Chapters XXIX and XXX.

<sup>3</sup>It may be worth while to repeat that (as stated by Lord Bryce) one of the distinctive advantages of federalism is that it provides opportunities for experimentation in legislative projects, locally. This is particularly important



legitimate though this desire may be, it is one that is founded upon sentimental grounds, that is, upon feelings of love for and allegiance to the particular state, rather than upon utilitarian considerations of governmental efficiency. And this is shown by the significant fact that the federal system has seldom been adopted save as a means of securing coöperation between bodies-politic that were previously independent of one another, and around which have grown feelings of loyalty and affection that have made their citizens unwilling to purchase national unity and strength if that should entail a total destruction of their several states as distinct political entities. This has been the case with all the great federal unions that now exist—the United States, Germany, Switzerland, Canada, and Australia.<sup>1</sup> With reference to all of these, the federal form was thus adopted, not willingly as the best possible form of political rule, but more or less unwillingly as a means of securing the amount of national strength and unity that circumstances made indispensable, while preserving, as far as possible, the independence of the several states to which their citizens had become historically at-

Federalism  
necessary  
for union  
without  
unity

in some countries, such as the United States, for divergent economic conditions—varying in the United States from the domestic system to the most complex industrialism—require diverse legislation and experimental regulation. (See Seligman, *Principles of Economics*, p. 106). Local autonomy is but the reflection, in political organization, of these differences. It is true, nevertheless, that self-government, with all these advantages, can be secured by delegation from a unitary government, which, in the first instance, is entrusted by the Constitution with all of the powers of government. But, historically, strong local feeling has preferred the more substantial guarantees of autonomy afforded by federalism.

<sup>1</sup> John Fiske declared federal government to be “the only kind of government which according to modern ideas . . . is permanently applicable to a whole continent.” *American Political Ideas* (1885), p. 92. Cf. Seeley’s view: “All political unions exist for the good of their members and should be just as large, and no larger, as they can be without ceasing to be beneficial.” *The Expansion of England*, p. 341.

For some remarks on the respective value of large and small states, see Duggan, *The League of Nations: The Principle and the Practice*, Chapter V; H. A. L. Fisher, *The Value of Small States* (Oxford War Pamphlets; reprinted in his *Studies in History and Politics*). An interesting criticism of this pamphlet is to be found in Marriott, *The European Commonwealth*, Chapter VII. See also Sidgwick, *The Elements of Politics*, Chapters XIV and XXVI.

tached. Thus it has been said of the American union that it was "wrung from the grinding necessities of a reluctant people"; and, as we know, the feeling that their primary and truest allegiance belonged to their individual states rather than to the national government persisted in the minds of many long after the National Constitution was adopted, and seventy-one years later was strong enough to lead the citizens of eleven of the states to secede from the union and attempt, at an enormous sacrifice of life and property, to maintain their independence.

Discontent  
with the  
National  
State

Composite states have been so successful that men speculate on the possibilities of a world federation.<sup>1</sup> "It is a significant circumstance that the dominant currents of thought during the war all had a supra-national orientation. There was then, and there still is now, a world-wide uneasy sense of discontent with the exclusively national basis of the old European system. The three great doctrines of the war—the League of Nations, *Mittel-Europa*, and the Bolshevik *Internationale*—were different expressions of this feeling; and, despite the irreconcilable conflict between them, they are symptoms of a universal state of mind, of which we ourselves may hardly be aware, but which the historian hereafter will probably describe as the characteristic feature of the political thought of to-day."<sup>2</sup>

#### TOPICS FOR FURTHER INVESTIGATION

International Unions.—Reinsch, *Public International Unions*; Woolf, *International Government*; Sayre, *Experiments in Interna-*

<sup>1</sup>H. G. Wells, *The Salvaging of Civilization* (1921); Minor, *A Republic of Nations* (1918), and the schemes collected in Woolf, *The Framework of a Lasting Peace* (1917). But see Phillips, *The Confederation of Europe* (2nd. ed.), Chapter VII, and "National Federations and World Federation," *Edinburgh Review*, July, 1917; Marriott, *The European Commonwealth*, Chapter XV, and Hobson, "Is International Government Possible?" *Hibbert Journal*, January, 1917.

<sup>2</sup>"A Farewell Survey," *The New Europe*, October 28, 1920. It is interesting to note that a lawyer like Mr. Lansing, who was worried because the sovereignty over mandated territories could not be definitely located (see his interesting memorandum on the subject, *The Peace Negotiations*, p. 151) speculates on the world state and its possession of sovereignty. See his "Notes on World Sovereignty," *American Journal of International Law*, January, 1921.

*tional Administration*; Hershey, *Essentials of International Public Law*.

Schemes for the Federation of the British Empire.—For references, see above, p. 174.

The Location of Sovereignty in a Composite State.—Garner, *Introduction to Political Science*; Willoughby, *The Nature of the State*; Freund, *Empire and Sovereignty*; Burgess, *Political Science and Comparative Constitutional Law*.

Federalism in Germany and the United States.—Ogg, *The Governments of Europe*; Lowell, *Governments and Parties in Continental Europe*; Bryce, *The American Commonwealth*.





## APPENDICES



## APPENDIX I

### THE OVERMAN ACT, MAY 20, 1918

For the national security and defence, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record: *Provided*, That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace, or at such earlier time as the President may designate: *Provided further*, That the termination of this Act shall not affect any act done or any right or obligation accruing or accrued pursuant to this Act and during the time that this Act is in force: *Provided further*, That the authority by this Act granted shall be exercised only in matters relating to the conduct of the present war.

Sec. 2. That in carrying out the purposes of this Act the President is authorized to utilize, coördinate, or consolidate any executive or administrative commissions, bureaus, agencies, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto.

Sec. 3. That the President is further authorized to establish an executive agency which may exercise such jurisdiction and control over the production of aeroplanes, aeroplane engines,

and aircraft equipment as in his judgment may be advantageous; and, further, to transfer to such agency, for its use, all or any moneys heretofore appropriated for the production of aeroplanes, aeroplane engines, and aircraft equipment.

Sec. 4. That for the purpose of carrying out the provisions of this Act, any moneys heretofore and hereafter appropriated for the use of any executive department, commission, bureau, agency, office, or officer shall be expended only for the purposes for which it was appropriated under the direction of such other agency as may be directed by the President hereunder to perform and execute said function.

Sec. 5. That should the President, in redistributing the functions among the executive agencies as provided in this Act, conclude that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper.

Sec. 6. That all laws or parts of laws conflicting with the provisions of this Act are to the extent of such conflict suspended while this Act is in force.

Upon the termination of this Act all executive or administrative agencies, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this Act to the contrary notwithstanding.



## APPENDIX II

### LOBBIES AND LOBBYISTS IN WASHINGTON<sup>1</sup>

"Remember that the eye of this country is onto you," wrote Bill Nye in a letter of advice and warning to Grover Cleveland when the latter became President the first time. To write such a thing to a President to-day would only fractionally state the case. The country at present not only has its composite eye "onto" the President but a good part of it is right in the midst of things at Washington with both composite feet, so to speak. This is accomplished by the maintenance at the National Capital of more than a hundred lobbies, whose duty it is to watch not only the Chief Executive but the whole works of the Government, and particularly Congress, so that nothing is slipped over that might imperil the real or fancied interests of the aggregations who pay the salaries of these lobby watchdogs. There is nowhere a complete list of the organizations that are represented in Washington lobbies, but we are told that practically every sort of American business is so represented, to say nothing of social, racial, religious, and educational groups. In a recent article in the *Detroit News* Jay G. Hayden gives a list of 120 such lobbies, compiled from Washington directories and the examination of the tenant lists of a number of the best-known office buildings in the city. The list is headed by the National Chamber of Commerce, which leads the business organizations. Manufacturers' associations are given first, as follows:

- National Association of Manufacturers.
- American Manufacturers' Export Association.
- Institute of American Meat Packers.
- American Automobile Association.
- National Canners' Association.
- Council of American Cotton Manufacturers.
- Founders' Association.
- Lumber Manufacturers' Association.
- Manufacturing Chemists' Association of America.
- Highway Industries Association.

<sup>1</sup>*Congressional Record*, February 2, 1921, p. 2535, reprinted from *The Literary Digest*, October 30, 1920.

Interstate Cottonseed Crushers' Association.  
 Merchants and Manufacturers' Association.  
 Southern Industrial Education Society.  
 United States Sugar Manufacturers' Association.  
 Western Petroleum Refiners' Association.

Attached to nearly all these bureaus are experts on tax laws, the tariff, labor conditions, and every other thing that may have an immediate or a remote bearing on the interests they represent. Other bureaus, closely related to the foregoing, are the following:

American Association of Engineers.  
 American Bankers' Association.  
 American Beet Sugar Association.  
 American Bureau of Trade Extension.  
 American Chemical Society.  
 American Mining Congress.  
 American Realty Exchange.  
 American Association of Real Estate Boards.  
 American Automobile Chamber of Commerce.  
 National Bureau of Wholesale Lumber Distributors.  
 National Industries Conference Board.  
 National Merchant Marine Association.  
 League of Commission Merchants of the United States.  
 National Oil Bureau.  
 National Petroleum Association.  
 American Patent Law Association.

The various farmers' associations that have come into being during the last few years are powerfully represented, but perhaps the most thoroughly looked-after industry is railroading.

As we read:

Chief of the bureaus under this heading is the American Railway Association, which operates the car-service bureau in close coöperation with the Interstate Commerce Commission and which also conducts a vigorous and constant propaganda in behalf of private ownership of the railways.

Attached to this bureau are several of the most capable statisticians and lawyers in the country, who are ever ready to supply information from the railway point of view to any congressional committee or elsewhere as it may be required. The railway association is, in fact, a close rival for the Interstate Commerce Commission in the scope of its public operations.

In the past, local public utilities, such as street railways, electric lighting and gas plants, were little in touch with the Federal Government. During the war, however, these companies were brought before the War Finance Corporation in the matter of security issues and before the War Labor Board for settlement of their disputes with employees.

More recently the passage of the new water-power law, which

places the development of new hydroelectric enterprises under direction of a board composed of the Secretaries of the Interior, Agriculture, and War has given these companies another reason for keen interest in the doings of the Government.

Among the utilities organizations already established in Washington are the following:

American Electric Railway War Board.

National Association of Railway and Public Utilities Commissions.

National Committee on Gas and Electric Service.

National Committee on Public Utilities Conditions.

Dixie Freight Traffic Association.

There is a growing activity of farm organizations looking to legislation in addition to the Farm Bureau, which, with 1,250 members, is now the leading farm organization in America. The societies of farmers with offices in Washington are as follows:

American Agricultural Association.

Eastern Agricultural Bureau.

Farmers' National Council.

The Grange.

Cane Growers' Association.

National Board of Farm Organizations.

Texas Cotton Association.

The labor organizations maintain a strong lobby, as do also those interested in the welfare of women. During and since the war a number of organizations were created in the interest of various racial groups. Then there is a large group of miscellaneous organizations ready to do battle for all kinds of things, from Christian Science to the promotion of smokeless coal. Even old John Barleycorn, ostensibly defunct, has a body of watchers at the Capital, ready to apply restoratives in case any symptoms of the revival of their favorite reveal themselves. Mr. Hayden continues:

Chief of the labor organizations in addition to the American Federation of Labor, which occupies an entire building of its own, are the organizations of Federal employees and the railroad brotherhoods.

Labor organizations, in addition to the very large number affiliated with the Federation of Labor, which maintain offices in the Capital, are as follows:

National Federation of Federal Employees.

National Federation of Post-Office Clerks.

National Association of Letter Carriers.

Brotherhood of Railway Clerks.

Brotherhood of Railway Signalmen.

Maintenance of Way Employees.

Plumb Plan League.

National Women's Trade Union League.

American Train Dispatchers' Association.

Women's organizations, which are active in promoting legislation before Congress, are by no means confined to the two leading suffrage associations, the National Women's Suffrage Association and the National Woman's Party. Others are as follows:

League of Women Voters.

Gentlewomen's League.

Congress of Mothers.

National Woman's Christian Temperance Union.

Women's Section of the Navy League.

Child Welfare Society.

One of the most conspicuous organizations in Washington is the National Coal Association, which came into being to direct the fight of the coal operators against restrictive legislation, and to represent the industry in its relations with the Federal Coal Administration during the war. This association has been continued in Washington, and it employs a large staff of experts in looking after its special interests in the Government and in propaganda distribution.

The representatives of racial groups and embryo governments seeking favors from the American Government are very much in evidence in the offices of Members of Congress and in the lobbies of the Capitol. Some of these racial organizations are as follows:

Irish National Bureau.

Poland Information Bureau.

Lithuanian National Council.

Luthuanian Information Bureau.

Bureau of Jewish Statistics.

National Association of Colored Races.

Jewish Press Service of America.

National Committee for Armenian and Syrian Relief.

British-Canadian Society.

Friends of Ukraine.

Korean Relief Society League.

Associations specially devoted to the suppression of the liquor traffic, in addition to the Anti-Saloon League, are the Board of Temperance of the Methodist Episcopal Church and the National Temperance Bureau.

Organizations of liquor dealers no longer appear as such among the Washington lobbyists. Through paid press agents, however, propaganda in favor of modification of the alcoholic content, as prescribed in the Volstead law, has been recently circulated. There is little doubt that the liquor lobby will make its appearance with the convening of the new Congress.



The number of organizations designed to promote armament and the counter organizations against militarism are the one group which appears to have dwindled as a result of the war. There are several of these organizations still active, however, and most conspicuous among them is the Navy League, which still maintains a large staff in Washington. Others in this classification are as follows:

Peace League of the World.

American Peace Society.

American Union *v.* Militarism.

The American Legion and the Private Soldiers' and Sailors' Legion are the two organizations of war veterans which maintain headquarters in the Capital.

Other organizations, the purpose of which is in some instances disclosed by their title, are as follows:

National Association for Protection of American Rights in Mexico.

National Association for Constitutional Government.

National Civil Service Reform League.

National Committee on Prisons and Prison Labor.

National Committee to Secure Rank for Army Nurses.

National Educational Association.

National Industrial Council.

National Committee for Soldiers' and Sailors' Relief.

National Negro Business League.

National Popular Government League.

National Committee for District of Columbia Suffrage.

National Patriotic Press.

Rivers and Harbors Congress.

National Voters' League.

National Forestry Association.

American Medical Society.

Christian Science Association.

Consumers' League.

Coöperative League of America.

Free Press Defense League.

League for Preservation of American Independence.

Osteopathic Association.

Physicians' Protective Association.

Prisoners' Relief Society.

Smokeless Coal Operators' Association.

Tuberculosis Association.

In addition to the formally organized bureaus there are numerous legislative agents who represent more than one special interest.

## APPENDIX III

### RULES<sup>1</sup>

FOR THE CONDUCT OF A PARLIAMENTARY ELECTION ON THE  
SYSTEM OF THE SINGLE TRANSFERABLE VOTE, WITH AN  
EXAMPLE.

1. At a parliamentary election, where there are two or more members to be elected, any election of the full number of members shall be conducted in accordance with the following rules, as illustrated in the First Schedule thereto.

2.—(1) Every elector shall have one vote only.

(2) An elector in giving his vote—

(a) must place on his ballot paper the figure 1 in the square opposite the name of the candidate for whom he votes;

(b) may in addition place on his ballot paper the figure 2 or the figures 2 and 3, or 2, 3, and 4, and so on, in the squares opposite the names of other candidates in the order of his preference.

3. The forms contained in the Second Schedule to these rules shall be substituted for the forms of front of ballot paper and of directions for the guidance of the voter contained in the Second Schedule to the Ballot Act, 1872.

4. A ballot paper shall be invalid on which—

(a) the figure 1 is not marked; or

(b) the figure 1 is set opposite the name of more than one candidate; or

(c) the figure 1 and some other figure is set opposite the name of the same candidate; or

(d) any mark is made not authorized by the Ballot Act, 1872, as modified by this Act.

5. After the ballot papers have been mixed, in accordance with the rules contained in the First Schedule of the Ballot Act, 1872, the returning officer shall examine the ballot papers and,

<sup>1</sup>These, with one or two small clerical alterations, are the draft rules as settled by the Government Draftsman when the Reform Act of 1918 was under consideration in the form of a Bill including provisions for the introduction of proportional representation in ordinary as well as university constituencies. (*White Paper Cd. 8768*, 1917, *H. M. Stationery Office and Agents for the sale of Government publications*.) Reprinted from Williams, *The Reform of Political Representation*, p. 106.

after rejecting any that are invalid, shall arrange the remainder in parcels according to the first preferences recorded for each candidate.

6. The returning officer shall then count the number of papers in each parcel, and credit each candidate with one vote in respect of each valid paper on which a first preference has been recorded for him, and he shall ascertain the total number of valid papers.

7. The returning officer shall then divide the total number of valid papers by a number exceeding by one the number of vacancies to be filled, and the result increased by one, disregarding any fractional remainder, shall be the number of votes sufficient to secure the return of a candidate (hereinafter called the "quota").

8. If at any time the number of votes credited to a candidate is equal to or greater than the quota, that candidate shall be declared elected.

9.—(1) If at any time the number of votes credited to a candidate is greater than the quota, the surplus shall be transferred in accordance with the provisions of this rule to the continuing candidates indicated on the ballot papers in the parcel of the elected candidate as being next in order of the voters' preference.

(2)—(a) If the votes credited to an elected candidate consist of original votes only, the returning officer shall examine all the papers in the parcel of the elected candidate whose surplus is to be transferred and shall arrange the transferable papers in sub-parcels according to the next preferences recorded thereon.

(b) If the votes credited to an elected candidate consist of original and transferred votes, or of transferred votes only, the returning officer shall examine the papers contained in the sub-parcel last received by the elected candidate and shall arrange the transferable papers therein in further sub-parcels according to the next preferences recorded thereon.

(c) In either case the returning officer shall make a separate sub-parcel of the non-transferable papers and shall ascertain the number of papers in each sub-parcel of transferable papers and in the sub-parcel of non-transferable papers.

(3) If the total number of papers in the sub-parcels of transferable papers is equal to or less than the surplus, the returning officer shall transfer each sub-parcel of transferable papers to the continuing candidate indicated thereon as the voters' next preference.

(4)—(a) If the total number of transferable papers is greater than the surplus, the returning officer shall transfer from each sub-parcel the number of papers which bears the same proportion to the number of papers in the sub-parcel as the surplus bears to the total number of transferable papers.

(b) The number of papers to be transferred from each sub-

parcel shall be ascertained by multiplying the number of papers in the sub-parcel by the surplus and dividing the result by the total number of transferable papers. A note shall be made of the fractional parts, if any, of each number so ascertained.

(c) If, owing to the existence of such fractional parts, the number of papers to be transferred is less than the surplus, so many of these fractional parts taken in the order of their magnitude, beginning with the largest, as are necessary to make the total number of papers to be transferred equal to the surplus, shall be reckoned as of the value of unity, and the remaining fractional parts shall be ignored.

(d) The particular papers to be transferred from each sub-parcel shall be those last filed in the sub-parcel.

(e) Each paper transferred shall be marked in such a manner as to indicate the candidate from and to whom the transfer is made.

(5)—(a) If more than one candidate has a surplus, the largest surplus shall be first dealt with.

(b) If two or more candidates have each the same surplus, regard shall be had to the number of original votes obtained by each candidate, and the surplus of the candidate credited with the largest number of original votes shall be first dealt with, and, if the numbers of the original votes are equal, the returning officer shall decide which surplus he will first deal with.

(c) The returning officer need not transfer the surplus of an elected candidate when that surplus together with any other surplus not transferred does not exceed the difference between the totals of the votes credited to the two continuing candidates lowest on the poll.

10.—(1) If at any time no candidate has a surplus (or when under the preceding rule any existing surplus need not be transferred), and one or more vacancies remain unfilled, the returning officer shall exclude from the poll the candidate credited with the lowest number of votes, and shall examine all the papers of that candidate, and shall arrange the transferable papers in sub-parcels according to the next preferences recorded thereon for continuing candidates, and shall transfer each sub-parcel to the candidate for whom that preference is recorded.

(2) If the total of the votes of the two or more candidates lowest on the poll, together with any surplus votes not transferred, is less than the votes credited to the next highest candidate, the returning officer may in one operation exclude those candidates from the poll and transfer their votes in accordance with the preceding regulation.

(3) If, when a candidate has to be excluded under this rule, two or more candidates have each the same number of votes and are lowest on the poll, regard shall be had to the number of



original votes credited to each of those candidates, and the candidate with fewest original votes shall be excluded, and, where the numbers of the original votes are equal, regard shall be had to the total number of votes credited to those candidates at the first transfer at which they had an unequal number of votes, and the candidate with the lowest number of votes at that transfer shall be excluded, and, where the numbers of votes credited to those candidates were equal at all transfers, the returning officer shall decide which shall be excluded.

11.—(1) Whenever any transfer is made under any of the preceding rules, each sub-paragraph of papers transferred shall be added to the parcel, if any, of papers of the candidate to whom the transfer is made, and that candidate shall be credited with one vote in respect of each paper transferred. Such papers as are not transferred shall be set aside as finally dealt with, and the votes given thereon shall thenceforth not be taken into account.

(2) If after any transfer a candidate has a surplus, that surplus shall be dealt with in accordance with and subject to the provisions contained in Rule 9 before any other candidate is excluded.

12.—(1) When the number of continuing candidates is reduced to the number of vacancies remaining unfilled, the continuing candidates shall be declared elected.

(2) When only one vacancy remains unfilled, and the votes of some one continuing candidate exceed the total of all the votes of the other continuing candidates, together with any surplus not transferred, that candidate shall be declared elected.

(3) When the last vacancies can be filled under this rule, no further transfer of votes need be made.

13. The returning officer shall record and give public notice of any transfer of votes made under these rules, and of the total number of votes credited to each candidate after any such transfer, in addition to the particulars prescribed by Rule 45 to the First Schedule to the Ballot Act, 1872. Such public notice may be in accordance with the form given in the first schedule to these rules.

14.—(1) Any candidate or his agent may, at any time during the counting of the votes, either before the commencement or after the completion of any transfer of votes (whether surplus or otherwise), request the returning officer to re-examine and recount the papers of all or any candidates (not being papers set aside at any previous transfer as finally dealt with), and the returning officer shall forthwith re-examine and recount the same accordingly. The returning officer may also at his discretion recount votes either once or more often in any case in which he is not satisfied as to the accuracy of any previous count: Provided that nothing herein shall make it obligatory on the returning officer to recount the same votes more than once.

(2) If upon an election petition—

- (i) any ballot papers counted by the returning officer are rejected as invalid, or
- (ii) any ballot papers rejected by the returning officer are declared valid,

the court may direct the whole or any part of the ballot papers to be recounted and the result of the election ascertained in accordance with these rules.

(3) On any recount, subject to such modifications as may be necessary by reason of any error in the original count, each paper shall take the same course as at the original count.

15.—(1) If any question shall arise in relation to any transfer of votes, the decision of the returning officer, whether expressed or implied by his acts, shall be final unless an objection is made by any candidate or his agent before the declaration of the poll, and in that event the decision of the returning officer may be reversed upon an election petition.

(2) If any decision of the returning officer is so reversed, the transfer in question and all operations subsequent thereto shall be void and the court shall direct what transfer is to be made in place of the transfer in question, and shall cause the subsequent operations to be carried out and the result of the election to be ascertained in accordance with these rules.

16. In these rules—

- (1) The expression “continuing candidate” means any candidate not elected and not excluded from the poll:
- (2) The expression “first preference” means the figure “1”; the expression “second preference” means the figure “2”; and the expression “third preference” means the figure “3” set opposite the name of any candidate, and so on:
- (3) The expression “transferable paper” means a ballot paper on which a second or subsequent preference is recorded for a continuing candidate:
- (4) The expression “non-transferable paper” means a ballot paper on which no second or subsequent preference is recorded for a continuing candidate:

Provided that a paper shall be deemed to be a non-transferable paper in any case in which—

(a) The names of two or more candidates (whether continuing or not) are marked with the same figure, and are next in order of preference; or

(b) The name of the candidate next in order of preference (whether continuing or not) is marked—

- (i) by a figure not following consecutively after some other figure on the ballot paper; or
- (ii) by two or more figures:

- (5) The expression "original vote" in regard to any candidate means a vote derived from a ballot paper on which a first preference is recorded for that candidate:
- (6) The expression "transferred vote" in regard to any candidate, means a vote derived from a ballot paper on which a second or subsequent preference is recorded for that candidate:
- (7) The expression "surplus" means the number of votes by which the total number of the votes, original and transferred, credited to any candidate, exceeds the quota.

17. These rules shall be construed as one with the Ballot Act, 1872, and that Act shall, in cases to which these rules are applicable, have effect subject to these rules.

18. These rules may be cited as the Parliamentary Elections (Single Transferable Vote) Rules, 1917.

## SCHEDULES

### FIRST SCHEDULE

#### EXAMPLE OF AN ELECTION CONDUCTED ON THE SYSTEM OF THE SINGLE TRANSFERABLE VOTE SET OUT ABOVE.

Let it be assumed that there are five members to be elected, and that there are ten candidates, A, B, C, D, E, F, G, H, I, K.

The ballot papers are examined, and the valid papers are arranged in separate parcels under the names of the candidates marked with the figure 1.

Each separate parcel is counted, and each candidate is credited with one vote in respect of each paper on which a first preference has been recorded for him.

The result of the count may be supposed to be as follows:—

	Votes
A. . . . .	2009
B. . . . .	952
C. . . . .	939
D. . . . .	746
E. . . . .	493
F. . . . .	341
G. . . . .	157
H. . . . .	152
I. . . . .	118
K. . . . .	93
<b>Total . . . .</b>	<b>6000</b>

*The Quota*

It is found that the total of all the valid votes is 6000. This total is divided by six (*i. e.*, the number which exceeds by one the number of vacancies to be filled), and 1001 (*i. e.*, the quotient 1000 increased by one) is the "quota," or the number of votes sufficient to elect a member.

A's votes exceed the quota, and he is declared elected.

*First Transfer*

A has 1008 surplus votes (*i. e.*, A's total 2009, less the quota 1001), and it is necessary to transfer this surplus (Rule 8 (1) ).

All A's 2009 papers are examined and arranged in separate sub-parcels according to the second preferences indicated thereon (Rule 9 (2) (a) ).

A separate sub-parcel is also formed of those papers on which no further available preference, *i. e.*, no further preference for any continuing candidate, is shown, and which are therefore not transferable (Rule 9 (2) (c) ).

The result is found to be as follows:—

A next available preference is shown for	D on	257 papers	
"	"	E on	11 "
"	"	F on	28 "
"	"	G on	1708 "
<hr/>			
Total of transferable papers	.	.	2004 "
Total of non-transferable papers	.	.	5 "
<hr/>			
Total of A's papers	.	.	2009

Since the total number of transferable papers (2004) exceeds the surplus (1008), only a portion of each sub-parcel can be transferred, and the number of papers to be transferred from each sub-parcel must bear the same proportion to the total number of papers in the sub-parcel as that which the surplus bears to the total number of transferable papers.

In other words, the number of papers to be transferred from each sub-parcel is ascertained by multiplying the number of papers in the sub-parcel by 1008 (the surplus), and dividing the result by 2004 (the total number of transferable papers).

The process is as follows:—

D's sub-parcel contains 257 papers, and his share of the surplus is, therefore:—

$$257 \times \frac{1008}{2004} \text{ or } 129 \frac{540}{2004}$$



E's sub-parcel contains 11 papers, and his share of the surplus is, therefore:—

$$11 \times \frac{1008}{2004} \text{ or } 5 \frac{1068}{2004}$$

F's sub-parcel contains 28 papers, and his share of the surplus is, therefore:—

$$28 \times \frac{1008}{2004} \text{ or } 14 \frac{168}{2004}$$

G's sub-parcel contains 1708 papers, and his share of the surplus is, therefore:—

$$1708 \times \frac{1008}{2004} \text{ or } 859 \frac{228}{2004}$$

Total . . . . . 1008

The numbers of papers to be transferred as determined by the preceding process contain fractions, and, since only whole papers can be transferred, so many of the largest of these fractions, taken in order of their magnitude, as will make the total number of papers to be transferred equal to the surplus are reckoned as of the value of unity.

Thus, as the *whole* numbers determined above amount to only 1007, (viz.,  $129 + 5 + 14 + 859$ ), or one short of the surplus 1008, the largest fraction  $\frac{1068}{2004}$  is reckoned as unity,

and the numbers of papers to be transferred are as follows:—

To D . . . . .	129	paper
To E . . . . .	6	"
To F . . . . .	14	"
To G . . . . .	859	"

Total, being A's surplus. . . 1008    "

The particular papers to be transferred to D, E, F, and G are those last filed in their respective sub-parcels, and, therefore, at the top of the sub-parcels. The papers to be transferred are to be marked so as to indicate the candidates from and to whom the transfer is made.

These papers are added in separate sub-parcels to the parcels of D, E, F, and G.

The totals of the votes credited to these candidates then become:—

		Votes
D . . . . .	746 + 129 =	875
E . . . . .	493 + 6 =	499
F . . . . .	341 + 14 =	355
G . . . . .	157 + 859 =	1016

The remainders of the papers in the sub-parcels (*i. e.*, those papers not transferred), together with the papers on which no further available preferences were marked, are collected together and formed into one parcel, representing A's quota of votes (1001), and these papers are set aside as finally dealt with. The parcel is made up as follows:—

The remainder of D's sub-parcel,	257 less 129 =	128
“ “ of E's “	11 less 6 =	5
“ “ of F's “	28 less 14 =	14
“ “ of G's “	1708 less 859 =	849
Non-transferable papers . . . . .		5

Total, being A's quota . . . . . 1001

The operations involved in this transfer are summarized in the following table:—

*Transfer of A's Surplus*

Surplus . . . . .	1008
Number of transferable papers . . . . .	2004
Proportion to be transferred. } = $\frac{\text{Surplus}}{\text{Number of transferable papers}}$ =	$\frac{1008}{2004}$

Names of Candidates marked as the next available preferences	Number of Original Papers	Number of Papers transferred	Number of Papers retained for A's quota
B . . . . .	...	...	...
C . . . . .	...	...	...
D . . . . .	257	129	128
E . . . . .	11	6	5
F . . . . .	28	14	14
G . . . . .	1708	859	849
H . . . . .	...	...	...
I . . . . .	...	...	...
K . . . . .	...	...	...
Total number of transferable papers . . . . .	2004	1008	996
Number of non-transferable papers . . . . .	5	...	5
Totals . . . . .	2009	1008	1001

The state of the poll on the conclusion of the transfer is as follows:—

	Votes
A . . . . .	1001 elected
G . . . . .	1016
B . . . . .	952
C . . . . .	939
D . . . . .	875
E . . . . .	499
F . . . . .	355
H . . . . .	152
I . . . . .	118
K . . . . .	93
Total . . . . .	<u>6000</u>

G now has 1016 votes, a number which is more than the quota. He is accordingly declared elected.

#### *Second Transfer*

G's surplus (1016 less 1001, or 15) would have to be transferred were it not for the provision of Rule 9 (5) (c). Under the latter rule the returning officer need not transfer a surplus which is less than the difference between the two lowest candidates on the poll, and where, therefore, the transfer could not alter the relative position of these two candidates, even if the whole surplus were transferred to the lowest candidate. In this case the difference between I and K, the two lowest candidates, is 25 (118 less 93), and therefore G's surplus need not be transferred.

The returning officer proceeds to distribute the papers of the candidate with the smallest total of votes.

K's parcel of 93 papers is therefore examined. It is found to contain 89 papers on which F is the next preference, and 4 on which C is the next preference.

Therefore 89 papers are transferred to F and 4 to C, being marked so as to indicate the transfer (Rule 9 (4) (c) ).

The poll now stands as follows:—

	Votes
A . . . . .	1001 elected
G . . . . .	1016 elected
B . . . . .	952
C . . . . .	943
D . . . . .	875
E . . . . .	499
F . . . . .	444
H . . . . .	152
I . . . . .	118
Total . . . . .	<u>5000</u>

*Third Transfer*

The poll shows that as a result of the second transfer no further candidate obtained the quota which would entitle him to election, and the next operation has to be determined upon.

The difference between I and H (152 less 118, *i.e.*, 34) exceeds G's surplus (15), which, therefore, is still allowed to remain untransferred (Rule 9 (5) (c)).

Candidate I is lowest on the poll, and his papers have to be distributed in the same manner as K's (Rule 10 (1)). But as the combined totals of H and I together with G's surplus ( $152 + 118 + 15 = 285$ ) are less than 444, the total of F, the next highest candidate, the returning officer avails himself of Rule 10 (2), and distributes the papers of both H and I in one operation.

The papers (152 + 118, or 270 in all) in the parcels of H and I are examined in one operation, and it is found that—

B is marked next preference on	119 papers	
D	107	
Non-transferable papers . . .	44	
Total . . . . .	270	

It should be stated that on some papers some or one of the candidates A, G, I, H, and K may have been marked as next in order of preference on the papers examined, but, as all these candidates are already either elected or excluded, any papers so marked pass to those of the other candidates for whom the next available preferences have been recorded.

The operation is completed by the transfer of 119 papers duly marked (Rule 9 (4) (e)) to B, and 107 to D, whilst the 44 non-transferable papers are set aside as finally dealt with (Rule 11 (1)).

The poll now stands as follows:—

	Votes	
A . . . . .	1001	elected
G . . . . .	1016	elected
B . . . . .	1071	
D . . . . .	982	
C . . . . .	943	
E . . . . .	499	
F . . . . .	444	
Non-transferable papers . . .	44	
Total . . . . .	6000	

B now has 1071 votes, a number which exceeds the quota. He is accordingly declared elected.



*Fourth Transfer*

B's surplus (70) exceeds the difference (55) between E and F, the two candidates lowest on the poll, and it is, therefore, necessary to distribute it.

For this purpose, only the sub-parcel of papers last transferred, containing 119 papers, is taken into account.

These are examined and arranged in sub-parcels (in the same manner as A's papers were examined and arranged) with the following result:—

A next preference is shown for E on 84 papers.  
No further preference is shown on 35 papers.

The total number of transferable papers (84) is thus greater than the surplus (70), and the proportion to be transferred is  $\frac{70}{84}$ . But there is only one candidate, E, entitled to participate in the transfer. E accordingly receives the whole of the surplus and the 70 papers last filed in E's sub-parcel are, therefore, transferred to him, after being marked so as to indicate their transfer from B to E. (Rule 9 (4) (e)).

The remainder of the papers in E's sub-parcel, together with the non-transferable papers, are placed with B's original parcel. The whole constitutes B's quota and these papers are set aside as finally dealt with (Rule 11 (1)).

B's quota is made up as follows:—

Original parcel . . . . .	952
Remainder of E's sub-parcel . . . . .	14
Non-transferable papers . . . . .	35
	<hr/>
Total . . . . .	1001
	<hr/>

The poll now stands as follows:—

	Votes	
A . . . . .	1001	elected
G . . . . .	1016	elected
B . . . . .	1001	elected
D . . . . .	982	
C . . . . .	943	
E . . . . .	569	
F . . . . .	444	
Non-transferable papers	44	
	<hr/>	
Total . . . . .	6000	
	<hr/>	

*Fifth Transfer*

No candidate is elected as the result of the transfer, and the next operation has to be determined upon.

G's surplus is still not distributable, being smaller than the difference between the totals of E and F, the two lowest candidates (Rule 9 (5) (c) ).

F is lowest and his papers have to be distributed.

On examination it is found that of F's 444 papers, 353 show a next preference for C, and the remainder, 91, contain no further preference.

The operation is completed by the transfer of 353 papers duly marked (Rule 9 (4) (e) ) to C, whilst the 91 non-transferable papers are set aside as finally dealt with (Rule 11 (1) ).

The polls now stand as follows:—

	Votes
A . . . . .	1001 elected
G . . . . .	1016 elected
B . . . . .	1001 elected
C . . . . .	1296
D . . . . .	982
E . . . . .	569
Non-transferable papers .	135
Total . . . .	<hr/> 6000 <hr/>

C has now 1296 votes, a number which exceeds the quota, and he is accordingly declared elected.

No further transfer is necessary, for, even if all C's surplus (295) and all G's surplus (15) were transferred to E, his total would only amount to 859.

But D's total (982) exceeds this number and he is therefore declared elected (Rule 12 (2) ).

The final result is that A, G, B, C, and D are elected.

The details of the various operations in this election are shown in the subjoined form of public notice or "result sheet."

## Public Notice of the Result of the Poll and of the Transfer of Votes.

Number of valid votes . . . . . 6000  
 Number of members to be elected . . . . . 5  
 Quota (number of votes sufficient to secure the election of a candidate) . . . . . 1001

Names of Candidates	Votes.	Transfer of A's Surplus	Result	Transfer of K's Votes	Result	Transfer of H's and I's Votes	Result	Transfer of B's Surplus	Result	Transfer of F's Votes	Final Result showing the Names of Candidates Elected, and the order of their Election.
A	2009	—1008	1001	...	1001	+119	1001	...	1001	...	1001 (Elected) A (1).
B	952	...	952	...	952	...	1071	+70	1001	...	1001 (Elected) B (3).
C	939	...	939	+4	943	...	943	...	943	+353	1296 (Elected) C (4).
D	746	+129	875	...	875	+107	982	...	982	...	982 (Elected) D (5).
E	493	+6	499	...	499	...	499	+70	569	...	569
F	341	+14	355	+89	444	...	444	...	444	—444	...
G	157	+859	1016	...	1016	...	1016	...	1016	...	1016 (Elected) G (2).
H	152	...	152	...	152	...	...	...	...	...	...
I	118	...	118	...	118	—152	...	...	...	...	...
K	93	...	93	—93	...	...	...	...	...	...	...
Non-transferable papers not transferred.	...	...	...	...	...	+44	44	...	44	+91	135
Total	6000	...	6000	...	6000	...	6000	...	6000	...	6000

## SECOND SCHEDULE

*Form of Front of Ballot Paper*

Counterfoil No.

Section 3.

*Note.*—The counterfoil is to have a number to correspond with that on the back of the ballot paper.

Mark Order of Preference in Spaces below.	Names of Candidates
	BROWN (John Brown, of 52 George Street, Bristol, Merchant).
	JONES (William David Jones, of 10 Charles Street, Bristol, Merchant).
	ROBERTSON (Henry Robertson, of 8 John Street, Bristol, Butcher).
	WILLIAMS (James Williams, of 5 William Street, Bristol, Dock Labourer).
	THOMAS (Walter Thomas, of 23 Ann Street, Bristol, Painter).
	MACINNES (Robert MacInnes, of 26 James Street, Bristol, Licensed Victualler).

*N.B.*—Vote by placing the figure 1 in the square opposite the name of the candidate for whom you vote. You may also place the figure 2, or the figures 2 and 3, or 2, 3, and 4, and so on, in the squares opposite the names of other candidates in the order of your preference for them.



*Form of Directions for the guidance of the Voter in voting, which shall be printed in conspicuous characters and placarded outside every Polling Station and in every compartment of a Polling Station.*

The voter will go into one of the compartments, and, with the pencil provided there, mark his ballot paper by writing the number 1 opposite the name of the candidate for whom he votes. He may also write the figures 2, 3, and so on, in accordance with the order of his choice or preference opposite the names of other candidates (that is to say):—

He must write 1 in the square space opposite to the name of the candidate for whom he votes.

He may also write 2 in the square space opposite to the name of the candidate he likes second best, and 3 in the square space opposite to the name of the candidate he likes third best.

And so on.

If the voter does not mark the figure 1 on his ballot paper, or marks the figure 1 opposite more than one name, or marks the figure 1 and some other figure opposite the same name, or places any mark on the paper by which he may be identified, his ballot paper will be invalid and will not be counted.

After marking the ballot paper, the voter will fold up the ballot paper so as to show the official mark on the back, and leaving the compartment will, without showing the front of the paper to any person, show the official mark on the back to the presiding officer, and then in the presence of the presiding officer put the paper into the ballot box and forthwith quit the polling station.

If the voter inadvertently spoils a ballot paper, he can return it to the officer, who will, if satisfied of such inadvertence, give him another paper.

If the voter takes the ballot paper out of the polling station or deposits in the ballot box any other paper than the one given him by the officer, he will be guilty of a misdemeanour, and be subject to imprisonment for any term not exceeding six months, with or without hard labour.

*Note.*—These directions shall be illustrated by examples of valid ballot papers, such as the following:—

*Examples of Ballot Papers validly marked.*

A.

Mark Order of Preference Spaces below	Names of Candidates
3	<b>BROWN</b> (John Brown, of 52 George Street, Bristol, Merchant).
4	<b>JONES</b> (William David Jones, of 10 Charles Street, Bristol, Engineer).
2	<b>ROBERTSON</b> (Henry Robertson, of 8 John Street, Bristol, Builder).
5	<b>WILLIAMS</b> (James Williams, of 5 William Street, Bristol, Dock Labourer).
1	<b>THOMAS</b> (Walter Thomas, of 23 Anne Street, Bristol, Painter).
6	<b>MACINNES</b> (Robert MacInnes, of 28 James Street, Bristol, Licensed Victualler).

B.

Mark Order of Preference in Spaces below	Names of Candidates
	<b>BROWN</b> (John Brown, of 52 George Street, Bristol, Merchant).
1	<b>JONES</b> (William David Jones, of 10 Charles Street, Bristol, Engineer).
	<b>ROBERTSON</b> (Henry Robertson, of 8 John Street, Bristol, Builder).
	<b>WILLIAMS</b> (James Williams, of 5 William Street, Bristol, Dock Labourer).
	<b>THOMAS</b> (Walter Thomas, of 23 Anne Street, Bristol, Painter).
	<b>MACINNES</b> (Robert MacInnes, of 28 James Street, Bristol, Licensed Victualler).

C.

Mark Order of Preference in Spaces below	Names of Candidates
	<b>BROWN</b> (John Brown, of 52 George Street, Bristol, Merchant).
3	<b>JONES</b> (William David Jones, of 10 Charles Street, Bristol, Engineer).
	<b>ROBERTSON</b> (Henry Robertson, of 8 John Street, Bristol, Builder).
1	<b>WILLIAMS</b> (James Williams, of 5 William Street, Bristol, Dock Labourer).
	<b>THOMAS</b> (Walter Thomas, of 23 Anne Street, Bristol, Painter).
2	<b>MACINNES</b> (Robert MacInnes, of 28 James Street, Bristol, Licensed Victualler).



## APPENDIX IV

### THE BUDGET AND ACCOUNTING ACT, 1921<sup>1</sup>

#### TITLE I.—DEFINITIONS

SECTION 1. This act may be cited as the “budget and accounting act, 1921.”

SEC. 2. When used in this act—

The terms “department and establishment” and “department or establishment” mean any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government, including the municipal government of the District of Columbia, but do not include the legislative branch of the Government or the Supreme Court of the United States;

The term “the budget” means the budget required by section 201 to be transmitted to Congress;

The term “bureau” means the bureau of the budget;

The term “director” means the director of the bureau of the budget; and

The term “assistant director” means the assistant director of the bureau of the budget.

#### TITLE II.—THE BUDGET

SEC. 201. The President shall transmit to Congress on the first day of each regular session the budget, which shall set forth in summary and in detail:

(a) Estimates of the expenditures and appropriations necessary, in his judgment, for the support of the Government for the ensuing fiscal year; except that the estimates for such year for the legislative branch of the Government and the Supreme Court of the United States shall be transmitted to the President on or before October 15 of each year, and shall be included by him in the budget without revision;

(b) His estimates of the receipts of the Government during the ensuing fiscal year, under (1) laws existing at the time the

<sup>1</sup>As reported (May 25, 1921) by the Committee of Conference on the disagreeing votes of the two Houses on the amendment of the House to S. 1084, *Congressional Record*, May 25, 1921, p. 1747.

budget is transmitted, and also (2) under the revenue proposals, if any, contained in the budget;

(c) The expenditures and receipts of the Government during the last completed fiscal year;

(d) Estimates of the expenditures and receipts of the Government during the fiscal year in progress;

(e) The amount of annual, permanent, or other appropriations, including balances of appropriations for prior fiscal years, available for expenditure during the fiscal year in progress, as of November 1 of such year;

(f) Balanced statements of (1) the condition of the Treasury at the end of the last completed fiscal year, (2) the estimated condition of the Treasury at the end of the fiscal year in progress, and (3) the estimated condition of the Treasury at the end of the ensuing fiscal year, if the financial proposals contained in the budget are adopted;

(g) All essential facts regarding the bonded and other indebtedness of the Government; and

(h) Such other financial statements and data as in his opinion are necessary or desirable in order to make known in all practical detail the financial condition of the Government.

SEC. 202. (a) If the estimated receipts for the ensuing fiscal year contained in the budget, on the basis of laws existing at the time the budget is transmitted, plus the estimated amounts in the Treasury at the close of the fiscal year in progress, available for expenditure in the ensuing fiscal year, are less than the estimated expenditures for the ensuing fiscal year contained in the budget, the President, in the budget, shall make recommendations to Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency.

(b) If the aggregate of such estimated receipts and such estimated amounts in the Treasury is greater than such estimated expenditures for the ensuing fiscal year, he shall make such recommendations as in his opinion the public interests require.

SEC. 203. (a) The President from time to time may transmit to Congress supplemental or deficiency estimates for such appropriations or expenditures as in his judgment (1) are necessary on account of laws enacted after the transmission of the budget or (2) are otherwise in the public interest. He shall accompany such estimates with a statement of the reasons therefor, including the reasons for their omission from the budget.

(b) Whenever such supplemental or deficiency estimates reach an aggregate which, if they had been contained in the budget, would have required the President to make a recommendation under subdivision (a) of section 202, he shall thereupon make such recommendation.

SEC. 204. (a) Except as otherwise provided in this act, the

contents, order, and arrangement of the estimates of appropriations and the statements of expenditures and estimated expenditures contained in the budget or transmitted under section 203, and the notes and other data submitted therewith, shall conform to the requirements of existing law.

(b) Estimates for lump-sum appropriations contained in the budget or transmitted under section 203 shall be accompanied by statements showing, in such detail and form as may be necessary to inform Congress, the manner of expenditure of such appropriations and of the corresponding appropriations for the fiscal year in progress and the last completed fiscal year. Such statements shall be in lieu of statements of like character now required by law.

SEC. 205. The President, in addition to the budget, shall transmit to Congress on the first Monday in December, 1921, for the service of the fiscal year ending June 30, 1923, only, an alternative budget, which shall be prepared in such form and amounts and according to such system of classification and itemization as is, in his opinion, most appropriate, with such explanatory notes and tables as may be necessary to show where the various items embraced in the budget are contained in such alternative budget.

SEC. 206. No estimate or request for an appropriation and no request for an increase in an item of any such estimate or request and no recommendation as to how the revenue needs of the Government should be met shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment unless at the request of either House of Congress.

SEC. 207. There is hereby created in the Treasury Department a bureau to be known as the bureau of the budget. There shall be in the bureau a director and an assistant director, who shall be appointed by the President and receive salaries of \$10,000 and \$7,500 a year, respectively. The assistant director shall perform such duties as the director may designate, and during the absence or incapacity of the director or during a vacancy in the office of director he shall act as director. The bureau, under such rules and regulations as the President may prescribe, shall prepare for him the budget, the alternative budget, and any supplemental or deficiency estimates, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments.

SEC. 208. (a) The director, under such rules and regulations as the President may prescribe, shall appoint and fix the compensation of attorneys and other employees and make expenditures for rent in the District of Columbia, printing, binding,



telegrams, telephone service, law books, books of reference, periodicals, stationery, furniture, office equipment, other supplies, and necessary expenses of the office, within the appropriations made therefor.

(b) No person appointed by the director shall be paid a salary at a rate in excess of \$6,000 a year, and not more than four persons so appointed shall be paid a salary at a rate in excess of \$5,000 a year.

(c) All employees in the bureau whose compensation is at a rate of \$5,000 a year or less shall be appointed in accordance with the civil service laws and regulations.

(d) The provisions of law prohibiting the transfer of employees of executive departments and independent establishments until after service of three years shall not apply during the fiscal years ending June 30, 1921, and June 30, 1922, to the transfer of employees to the bureau.

(e) The bureau shall not be construed to be a bureau or office created since January 1, 1916, so as to deprive employees therein of the additional compensation allowed civilian employees under the provisions of section 6 of the legislative, executive, and judicial appropriation act for the fiscal years ending June 30, 1921, and June 30, 1922, if otherwise entitled thereto.

SEC. 209. The bureau, when directed by the President, shall make a detailed study of the departments and establishments for the purpose of enabling the President to determine what changes (with a view of securing greater economy and efficiency in the conduct of the public service) should be made in (1) the existing organization, activities, and methods of business of such departments or establishments, (2) the appropriations therefor, (3) the assignment of particular activities to particular services, or (4) the regrouping of services. The results of such study shall be embodied in a report or reports to the President, who may transmit to Congress such report or reports or any part thereof with his recommendations on the matters covered thereby.

SEC. 210. The bureau shall prepare for the President a codification of all laws or parts of laws relating to the preparation and transmission to Congress of statements of receipts and expenditures of the Government and of estimates of appropriations. The President shall transmit the same to Congress on or before the first Monday in December, 1921, with a recommendation as to the changes which, in his opinion, should be made in such laws or parts of laws.

SEC. 211. The powers and duties relating to the compiling of estimates now conferred and imposed upon the Division of Bookkeeping and Warrants of the office of the Secretary of the Treasury are transferred to the bureau.



SEC. 212. The bureau shall, at the request of any committee of either House of Congress having jurisdiction over revenue or appropriations, furnish the committee such aid and information as it may request.

SEC. 213. Under such regulations as the President may prescribe, (1) every department and establishment shall furnish to the bureau such information as the bureau may from time to time require, and (2) the director and the assistant director or any employee of the bureau when duly authorized shall, for the purpose of securing such information, have access to, and the right to examine, any books, documents, papers, or records of any such department or establishment.

SEC. 214. (a) The head of each department and establishment shall designate an official thereof as budget officer therefor, who, in each year under his direction and on or before a date fixed by him, shall prepare the departmental estimates.

(b) Such budget officer shall also prepare, under the direction of the head of the department or establishment, such supplemental and deficiency estimates as may be required for its work.

SEC. 215. The head of each department and establishment shall revise the departmental estimates and submit them to the bureau on or before September 15 of each year. In case of his failure so to do the President shall cause to be prepared such estimates and data as are necessary to enable him to include in the budget estimates and statements in respect to the work of such department or establishment.

SEC. 216. The departmental estimates and any supplemental or deficiency estimates submitted to the bureau by the head of any department or establishment shall be prepared and submitted in such form, manner, and detail as the President may prescribe.

SEC. 217. For expenses of the establishment and maintenance of the bureau there is appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$225,000 to continue available during the fiscal year ending June 30, 1922.

### TITLE III.—GENERAL ACCOUNTING OFFICE

SEC. 301. There is created an establishment of the Government to be known as the general accounting office, which shall be independent of the executive departments and under the control and direction of the comptroller general of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 1, 1921. All other officers and employees of the office of the Comptroller of the Treasury shall become officers and employees in the general accounting office at their grades and salaries on July 1, 1921,

and all books, records, documents, papers, furniture, office equipment, and other property of the office of the Comptroller of the Treasury shall become the property of the general accounting office. The comptroller general is authorized to adopt a seal for the general accounting office.

SEC. 302. There shall be in the general accounting office a comptroller general of the United States and an assistant comptroller general of the United States, who shall be appointed by the President, with the advice and consent of the Senate, and shall receive salaries of \$10,000 and \$7,500 a year, respectively. The assistant comptroller general shall perform such duties as may be assigned to him by the comptroller general, and during the absence or incapacity of the comptroller general, or during a vacancy in that office, shall act as comptroller general.

SEC. 303. Except as hereinafter provided in this section, the comptroller general and the assistant comptroller general shall hold office for 15 years. The comptroller general shall not be eligible for reappointment. The comptroller general or the assistant comptroller general may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the comptroller general or assistant comptroller general has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. Any comptroller general or assistant comptroller general removed in the manner herein provided shall be ineligible for reappointment to that office. When a comptroller general or assistant comptroller general attains the age of 70 years he shall be retired from his office.

SEC. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this act, be vested in and imposed upon the general accounting office and be exercised without direction from any other officer. The balances certified by the comptroller general shall be final and conclusive upon the executive branch of the Government. The revision by the comptroller general of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921.

The administrative examination of the accounts and vouchers of the Postal Service now imposed by law upon the Auditor for the Post Office Department shall be performed on and after July 1, 1921, by a bureau in the Post Office Department to be

known as the bureau of accounts, which is hereby established for that purpose. The bureau of accounts shall be under the direction of a comptroller, who shall be appointed by the President, with the advice and consent of the Senate, and shall receive a salary of \$5,000 a year. The comptroller shall perform the administrative duties now performed by the Auditor for the Post Office Department and such other duties in relation thereto as the Postmaster General may direct. The appropriation of \$5,000 for the salary of the Auditor for the Post Office Department for the fiscal year 1922 is transferred and made available for the salary of the comptroller, bureau of accounts, Post Office Department. The officers and employees of the office of the Auditor for the Post Office Department engaged in the administrative examination of accounts shall become officers and employees of the bureau of accounts at their grades and salaries on July 1, 1921. The appropriations for salaries and for contingent and miscellaneous expenses and tabulating equipment for such office for the fiscal year 1922, and all books, records, documents, papers, furniture, office equipment, and other property shall be apportioned between, transferred to, and made available for the bureau of accounts and the general accounting office, respectively, on the basis of duties transferred.

SEC. 305. Section 236 of the revised statutes is amended to read as follows:

“SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the general accounting office.”

SEC. 306. All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the general accounting office. Copies of any books, records, papers, or documents, and transcripts from the books and proceedings of the general accounting office, when certified by the comptroller general or the assistant comptroller general, under its seal, shall be admitted as evidence with the same effect as the copies and transcripts referred to in sections 882 and 886 of the Revised Statutes.

SEC. 307. The comptroller general may provide for the payment of accounts or claims adjusted and settled in the general accounting office, through disbursing officers of the several departments and establishments, instead of by warrant.

SEC. 308. The duties now appertaining to the Division of Public Moneys of the Office of the Secretary of the Treasury, so far as they relate to the covering of revenues and repayments into the Treasury, the issue of duplicate checks and warrants, and the certification of outstanding liabilities for payment, shall



be performed by the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury.

SEC. 309. The comptroller general shall prescribe the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States.

SEC. 310. The offices of the six auditors shall be abolished, to take effect July 1, 1921. All other officers and employees of these offices except as otherwise provided herein shall become officers and employees in the general accounting office at their grades and salaries on July 1, 1921. All books, records, documents, papers, furniture, office equipment, and other property of these offices, and of the Division of Bookkeeping and Warrants, so far as they relate to the work of such division transferred by section 304, shall become the property of the general accounting office. The general accounting office shall occupy temporarily the rooms now occupied by the office of the Comptroller of the Treasury and the six auditors.

SEC. 311. (a) The comptroller general shall appoint, remove, and fix the compensation of such attorneys and other employees in the general accounting office as may from time to time be provided for by law.

(b) All such appointments, except to positions carrying a salary at a rate of more than \$5,000 a year, shall be made in accordance with the civil-service laws and regulations.

(c) No person appointed by the comptroller general shall be paid a salary at a rate of more than \$6,000 a year, and not more than four persons shall be paid a salary at a rate of more than \$5,000 a year.

(d) All officers and employees of the general accounting office, whether transferred thereto or appointed by the comptroller general, shall perform such duties as may be assigned to them by him.

(e) All official acts performed by such officers or employees specially designated therefor by the comptroller general shall have the same force and effect as though performed by the comptroller general in person.

(f) The comptroller general shall make such rules and regulations as may be necessary for carrying on the work of the general accounting office, including rules and regulations concerning the admission of attorneys to practice before such office.

SEC. 312. (a) The comptroller general shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of



the work of the general accounting office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The comptroller general shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

(c) The comptroller general shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

(e) He shall furnish such information relating to expenditures and accounting to the bureau of the budget as it may request from time to time.

SEC. 313. All departments and establishments shall furnish to the comptroller general such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the comptroller general, or any of his assistants or employees, when duly authorized by him, shall for the purpose of securing such information have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the Revised Statutes.

SEC. 314. The Civil Service Commission shall establish an eligible register for accountants for the general accounting office, and the examinations of applicants for entrance upon such register shall be based upon questions approved by the comptroller general.

SEC. 315. (a) All appropriations for the fiscal year ending June 30, 1922, for the offices of the Comptroller of the Treasury and the six auditors are transferred to and made available for

the general accounting office, except as otherwise provided herein.

(b) During such fiscal year the comptroller general, within the limit of the total appropriations available for the general accounting office, may make such changes in the number and compensation of officers and employees appointed by him or transferred to the general accounting office under this act as may be necessary.

(c) There shall also be transferred to the general accounting office such portions of the appropriations for rent and contingent and miscellaneous expenses, including allotments for printing and binding, made for the Treasury Department for the fiscal year ending June 30, 1922, as are equal to the amounts expended from similar appropriations during the fiscal year ending June 30, 1921, by the Treasury Department for the offices of the Comptroller of the Treasury and the six auditors.

(d) During the fiscal year ending June 30, 1922, the appropriations and portions of appropriations referred to in this section shall be available for salaries and expenses of the general accounting office, including payment for rent in the District of Columbia, traveling expenses, the purchase and exchange of law books, books of reference, and for all necessary miscellaneous and contingent expenses.

SEC. 316. The general accounting office and the bureau of accounts shall not be construed to be a bureau or office created since January 1, 1916, so as to deprive employees therein of the additional compensation allowed civilian employees under the provisions of section 6 of the legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1922, if otherwise entitled thereto.

SEC. 317. The provisions of law prohibiting the transfer of employees of executive departments and independent establishments until after service of three years shall not apply during the fiscal year ending June 30, 1922, to the transfer of employees to the general accounting office.

SEC. 318. This act shall take effect upon its approval by the President: *Provided* That sections 301 to 317, inclusive, relating to the general accounting office and the bureau of accounts, shall take effect July 1, 1921.

## APPENDIX V

### THE CONSTITUTION OF JAPAN<sup>1</sup>

In 1867 the Shogun, until then the real ruler of Japan, surrendered his powers to the Emperor. The disappearance of the Shogunate weakened the feudal system, which was, however, made the basis of the first representative organization. In February, 1868, a superior council and seven ministerial departments were organized; a deliberative assembly was convened, its members to be composed of delegates appointed by the feudal chiefs. In the same year the Emperor took an oath that "the system of a deliberative assembly should be adopted and that all measures should be taken in conformity with public opinion." The organization of government upon a feudal basis proved unsatisfactory; the deliberative assembly was abolished in 1870, and the feudal régime itself was suppressed in 1871.

An agitation in favor of national representative institutions began in 1874, but those in charge of the government considered such a step premature; in 1878 representative provincial councils were created. Beginning in 1880 a vigorous political propaganda was conducted in favor of the establishment of a representative assembly; an imperial edict of 12 October, 1881, announced that the first Imperial Diet would be convened in 1890.

Between 1881 and 1889 important reforms were made in the organization of the government. The Constitution was promulgated on 11 February, 1889, and at the same time were issued the Imperial House Law, the Imperial Ordinance concerning the House of Peers, the Law of the Houses, the Electoral Law for members of the House of Representatives, and the Law of Finance. The first Diet was formally opened on 29 November, 1890.<sup>2</sup>

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<sup>1</sup>This text of the Japanese Constitution is reprinted from Herbert F. Wright (editor), *The Constitutions of the States at War: 1914-1918*, p. 351, a compilation prepared for the State Department in connection with the work of the Commission to Negotiate the Peace (Washington: Government Printing Office, 1919.) Mr. Wright took the text from Dodd. Subsequent footnotes are quoted.

<sup>2</sup>These introductory paragraphs are reprinted from W. F. Dodd, *Modern Constitutions* (Chicago, 1909), vol. II, p. 23. There is also a very good account in F. R. Dareste et P. Dareste, *Les Constitutions modernes* (3d edition, Paris, 1910), vol. II, pp. 686-687.



CONSTITUTION OF 11 FEBRUARY 1889<sup>1</sup>

## CHAPTER I.—THE EMPEROR

ARTICLE 1. The Empire of Japan<sup>2</sup> shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

ART. 2. The imperial throne shall be succeeded to by imperial male descendants, according to the provisions of the Imperial House Law.<sup>3</sup>

ART. 3. The Emperor is sacred and inviolable.

ART. 4. The Emperor is the head of the Empire, combining in himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.

ART. 5. The Emperor exercises the legislative power with the consent of the Imperial Diet.

ART. 6. The Emperor gives sanction to laws and orders them to be promulgated<sup>4</sup> and executed.

ART. 7. The Emperor convokes the Imperial Diet, opens, closes and prorogues it, and dissolves the House of Representatives.

ART. 8. The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, imperial ordinances in the place of laws.

Such imperial ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said ordinances, the government shall declare them to be invalid for the future.

ART. 9. The Emperor issues, or causes to be issued, the ordinances<sup>5</sup> necessary for the carrying out of the laws, or for the

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<sup>1</sup>The translation given here is reprinted from Dodd, *op. cit.*, pp. 24-33, and was adopted by him almost without change from the official English translation issued from Tokyo in 1889; the difficulty of obtaining revision makes it necessary to give this Constitution in the untechnical language in which it here appears. English translation also in the *British and Foreign State Papers*, 81: pp. 289-295. French translation in Dareste, *op. cit.*, pp. 687-696. German translation in Paul Posener, *Die Staatsverfassungen des Erdballs* (Charlottenburg, 1909), pp. 924-933.

<sup>2</sup>The island of Hokushu and the Nansei Islands have no representatives in the Imperial Diet.

<sup>3</sup>By the Imperial House Law of 11 February, 1889 (62 articles), the succession is in the male descendants of the Emperor, in accordance with the law of primogeniture; when the Emperor has no descendants, the crown goes to the male relative of the nearest collateral male line. English translation of this law in the *British and Foreign State Papers*, 81: pp. 295-301.

<sup>4</sup>Ordinances of 1881 and 1886 govern the forms of promulgation.

<sup>5</sup>A law of 1880 authorizes the Emperor to sanction his ordinances with a penalty.



maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no ordinance shall in any way alter any of the existing laws.

ART. 10. The Emperor determines the organization of the different branches of the administration, and the salaries of all civil and military officers, and appoints and dismisses the same. Exceptions especially provided for in the present Constitution or in other laws shall be in accordance with the respective provisions (bearing thereon).

ART. 11. The Emperor has the supreme command of the army and navy.

ART. 12. The Emperor determines the organization and peace standing of the army and navy.

ART. 13. The Emperor declares war, makes peace and concludes treaties.

ART. 14. The Emperor proclaims a state of siege.

The conditions and effects of a state of siege shall be determined by law.

ART. 15. The Emperor confers titles of nobility, rank, orders and other marks of honor.

ART. 16. The Emperor orders amnesty, pardon, commutation of punishment and rehabilitation.

ART. 17. A regency shall be instituted in conformity with the provisions of the Imperial House Law.

The regent shall exercise the powers appertaining to the Emperor, in his name.

## CHAPTER II.—RIGHTS AND DUTIES OF SUBJECTS

ART. 18. The conditions necessary for being a Japanese subject shall be determined by law.<sup>1</sup>

ART. 19. Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military offices equally, and may fill any other public offices.

ART. 20. Japanese subjects are amenable to service in the army or navy, according to the provisions of law.

ART. 21. Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law.

ART. 22. Japanese subjects shall have the liberty of abode and of changing the same within the limits of law.

ART. 23. No Japanese subject shall be arrested, detained, tried or punished, unless according to law.<sup>2</sup>

ART. 24. No Japanese subject shall be deprived of his right of being tried by the judges determined by law.

<sup>1</sup>Law of 1899 on nationality.

<sup>2</sup>Code of Penal Procedure of 1887.

ART. 25. Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

ART. 26. Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolable.

ART. 27. The right of property of every Japanese subject shall remain inviolable.

Measures necessary to be taken for the public benefit shall be provided by law.<sup>1</sup>

ART. 28. Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

ART. 29. Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication,<sup>2</sup> public meeting and association.<sup>3</sup>

ART. 30. Japanese subjects may present petitions, by observing the proper forms of respect and by complying with the rules specially provided for the same.

ART. 31. The provisions in the present chapter shall not affect the exercise of the powers appertaining to the Emperor, in times of war or in cases of national emergency.

ART. 32. Each and every one of the provisions contained in the preceding articles of the present chapter, that are not in conflict with the laws or the rules and discipline of the army and navy, shall apply to the officers and men of the army and navy.

### CHAPTER III.—THE IMPERIAL DIET

ART. 33. The Imperial Diet shall consist of two houses, a House of Peers and a House of Representatives.<sup>4</sup>

ART. 34. The House of Peers shall, in accordance with the Ordinance concerning the House of Peers,<sup>5</sup> be composed of the

<sup>1</sup>Law of 1889 on expropriation for the public benefit.

<sup>2</sup>Law of 1893 on the press gave way to a new law in 1909.

<sup>3</sup>Law of 1893 on freedom of assembly and association.

<sup>4</sup>The internal organization of the two houses is regulated by the Law of the Houses of 11 February 1889 (see below, Article 51). The president and vice-president of the House of Peers are nominated by the Emperor from among the members, and the president and vice-president of the House of Representatives are nominated by the Emperor from among three candidates, elected by the House. The presidents of both houses receive an annual salary of 5,000 yen; vice-presidents, 3,000 yen; elected and nominated members of the House of Peers and members of the House of Representatives, 2,000 yen, besides traveling expenses.

<sup>5</sup>By the Imperial Ordinance of 11 February 1889 (13 articles) concerning the House of Peers, the latter is composed of *a.* male members of the Imperial family of full age; *b.* princes and marquises of the age of 25 and upwards; *c.* counts, vis-

members of the imperial family, of the orders of nobility, and of those persons who have been nominated thereto by the Emperor.

ART. 35. The House of Representatives shall be composed of members elected by the people, according to the provisions of the electoral law.<sup>1</sup>

ART. 36. No one shall at one and the same time be a member of both houses.

ART. 37. Every law requires the consent of the Imperial Diet.

ART. 38. Both houses shall vote upon projects of law submitted to them by the government, and may respectively initiate projects of law.

ART. 39. A bill, which has been rejected by either the one or the other of the two houses, shall not be again brought in during the same session.

ART. 40. Both houses may make representations to the government as to laws or upon any other subject. When, however, such representations are not accepted, they can not be made a second time during the same session.

ART. 41. The Imperial Diet shall be convoked every year.

ART. 42. A session of the Imperial Diet shall last during three months. In case of necessity, the duration of a session may be prolonged by imperial order.

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counts and barons of the age of 25 and upwards, who have been elected by the members of their respective orders, never to exceed one fifth of each order; *d.* persons above the age of 30 years, who have been nominated members by the Emperor for meritorious services to the State or for erudition; *e.* persons who shall have been elected in each city (*Fu*) and prefecture (*Ken*) from among and by the 15 male inhabitants thereof, above the age of 30 years, paying therein the highest amount of direct national taxes on land, industry or trade, and have been nominated by the Emperor. The term of membership under *c* and *e* is seven years; under *a*, *b*, and *d*, for life. The number of members under *d* and *e* must not exceed the number of other members. In 1917, the total number of peers was 364 (see *The Statesman's Year-book*, 1917, p. 1058). English translation of this law in Dodd, *op. cit.*, pp. 33-35.

<sup>1</sup>The Electoral Law of 11 February 1889 was amended in 1900 and 1908. The members of the House number 379, a fixed number being returned from each electoral district. The proportion of the number of members to the population is one to about 136,522. Voting is by secret single ballot. The right to vote is enjoyed by male subjects of not less than full 25 years of age, who have been permanent and actual residents in the electoral district for not less than a year and who pay land tax to the amount of not less than 10 yen (about \$5) in a year for more than one year, or direct taxes other than land tax to the amount of not less than 10 yen in a year for more than two years, or land tax together with other direct national taxes to the amount of not less than 10 yen in a year for more than two years. In general, male subjects of not less than 30 years of age are eligible to the House, without any qualification arising from payment of taxes. Disqualified for membership are the imperial household officials, priests, students, teachers of elementary schools, government contractors, and election officials.



ART. 43. When urgent necessity arises, an extraordinary session may be convoked, in addition to the ordinary one.

The duration of an extraordinary session shall be determined by imperial order.

ART. 44. The opening, closing, prolongation of session, or prorogation of the Imperial Diet shall be effected simultaneously for both houses.

In case the House of Representatives has been ordered to dissolve, the House of Peers shall at the same time be prorogued.

ART. 45. When the House of Representatives has been ordered to dissolve, members shall be caused by imperial order to be newly elected, and the new House shall be convoked within five months from the day of dissolution.

ART. 46. No debate shall be opened and no vote shall be taken in either house of the Imperial Diet, unless not less than one third of the whole number of the members thereof is present.

ART. 47. Votes shall be taken in both houses by absolute majority. In the case of a tie, the president shall have the casting vote.

ART. 48. The deliberations of both houses shall be held in public. The deliberations may, however, upon demand of the government or by resolution of the house, be held in secret sitting.

ART. 49. Both houses of the Imperial Diet may respectively present addresses to the Emperor.

ART. 50. Both houses may receive petitions presented by subjects.

ART. 51. Both houses may enact, besides what is provided for in the present Constitution and in the Law of the Houses, rules necessary for the management of their internal affairs.

ART. 52. No member of either house shall be held responsible outside the respective houses, for any opinion uttered or for any vote given in the house. When, however, a member himself has given publicity to his opinions by public speech, by documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law.

ART. 53. The members of both houses shall, during the session, be free from arrest, unless with the consent of the house, except in cases where taken *in flagrante delicto*, or of offenses connected with a state of internal commotion or with a foreign trouble.

ART. 54. The ministers of State and the delegates of the government may, at any time, take seats and speak in either house.



# CHAPTER IV.—THE MINISTERS OF STATE AND THE PRIVY COUNCIL

ART. 55. The respective ministers of State<sup>1</sup> shall give their advice to the Emperor, and be responsible for it.

All laws, imperial ordinances and imperial rescripts of whatever kind, that relate to the affairs of State, require the counter-signature of a minister of State.

ART. 56. The Privy Council shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Emperor.

## CHAPTER V.—THE JUDICIAL POWER

ART. 57. The judicial power shall be exercised by the courts of law according to law, in the name of the Emperor.

The organization of the courts of law shall be determined by law.<sup>2</sup>

ART. 58. The judges shall be appointed from among those who possess proper qualifications according to law.

No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.

Rules for disciplinary punishment shall be determined by law.

ART. 59. Trials and judgments of a court shall be conducted publicly. When, however, there exists any fear that such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provision of law or by the decision of the court.

ART. 60. All matters that fall within the competency of special tribunals shall be specially provided for by law.

ART. 61. No suit which relates to rights alleged to have been infringed by the illegal measures of the executive authorities, and which should come within the competency of the Court of Administrative Litigation, specially established by law,<sup>3</sup> shall be taken cognizance of by a court of law.

<sup>1</sup>The Council of Ministers in its present form dates from 1885, but its organization is governed by an ordinance of 1889. The Council is composed of 10 ministers.

1. Prime Minister.

2. Minister of Foreign Affairs.

3. Minister of the Interior.

4. Minister of Finances.

6. Minister of Marine.

7. Minister of Justice.

8. Minister of Instruction.

9. Minister of Agriculture and Commerce.

5. Minister of War.

10. Minister of Communications.

<sup>2</sup>The institution of the Court of Cassation dates from 1875. A law of 1891 governs the organization of the courts. The jury system does not exist in Japan.

<sup>3</sup>This law was promulgated in 1890.

CHAPTER VI.—FINANCE<sup>1</sup>

ART. 62. The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.

However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.

The raising of national loans and the contracting of other liabilities to the charge of the national treasury, except those that are provided in the budget, shall require the consent of the Imperial Diet.

ART. 63. The taxes levied at present shall, in so far as they are not remodeled by a new law, be collected according to the old system.

ART. 64. The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual budget.

Any and all expenditures exceeding the appropriations set forth in the titles and paragraphs of the budget, or that are not provided for in the budget, shall subsequently require the appropriation of the Imperial Diet.

ART. 65. The budget shall be first laid before the House of Representatives.

ART. 66. The expenditures of the Imperial House shall be defrayed every year out of the national treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.

ART. 67. Those expenditures already fixed and based upon the powers belonging to the Emperor by the Constitution, and such expenditures as may have arisen by the effect of law, or that relate to the legal obligations of the government, shall neither be rejected nor reduced by the Imperial Diet, without the concurrence of the government.

ART. 68. In order to meet special requirements, the government may ask the consent of the Imperial Diet to a certain amount as a continuing expenditure fund, for a previously fixed number of years.

ART. 69. In order to supply deficiencies, which are unavoidable, in the budget, and to meet requirements unprovided for in the same, a reserve fund shall be provided in the budget.

ART. 70. When the Imperial Diet can not be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety the

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<sup>1</sup>The Law of 11 February 1889 on finances (33 articles), which governs budgetary questions, was completed by a law of 1890.

government may enact all necessary financial measures, by means of an imperial ordinance.

In the case mentioned in the preceding clause, the matter shall be submitted to the Imperial Diet at its next session, and its approbation shall be obtained thereto.

ART. 71. When the Imperial Diet has not voted on the budget, or when the budget has not been brought into actual existence, the government shall carry out the budget of the preceding year.

ART. 72. The final account of the expenditures and revenue of the State shall be verified and confirmed by the Board of Audit, and it shall be submitted by the government to the Imperial Diet, together with the report of verification of the said board.

The organization and competency of the Board of Audit shall be determined by a special law.<sup>1</sup>

#### CHAPTER VII.—SUPPLEMENTARY RULES

ART. 73. When it may become necessary in future to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by imperial order.

In the above case, neither House shall open the debate, unless not less than two thirds of the whole number of members are present, and no amendment shall be passed, unless a majority of not less than two thirds of the members present is obtained.

ART. 74. No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.

No provision of the present Constitution can be modified by the Imperial House Law.

ART. 75. No modification shall be introduced into the Constitution, or into the Imperial House Law, during the time of a regency.

ART. 76. Existing legal enactments, such as laws, regulations, ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present Constitution, continue in force.

All existing contracts or orders, that entail obligations upon the government, and that are connected with expenditure, shall come within the scope of Article 67.

<sup>1</sup>Law of 1889.





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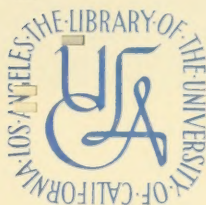
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